

EXECUTIVE POWER IN POLITICAL AND CORPORATE CONTEXTS

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The subject of this symposium issue is the status of the unitary executive under the American Constitution. For the purposes of this Article, the term “unitary executive” receives a narrow definition that tracks Steven Calabresi and Christopher Yoo’s careful and exacting historical account of the topic.¹ The only question at stake is whether, and to what extent, the President has the power to fire—delicately referred to as the “power to remove”—officials within the executive branch. Is that power one that can be exercised unilaterally and at will, or is it one that can only be exercised for cause or with the concurrence of the legislative branch, or some portion thereof? Article II does not address the endless permutations of removal, which are difficult enough in connection with ordinary employment contracts that are negotiated without any constitutional overlay.² Instead, it only offers a skeletal account of the executive branch. The Vesting Clause reads: “The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years”³ The Take Care Clause provides that “he shall take Care that the Laws be faithfully executed.”⁴ In addition, Article II contains a provision detailing the process of appointment for various public officials.⁵ As is typical, the Constitution contains no

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1 For this historical account, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

2 For my views on this question, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (examining the arguments for and against the contract at will and defending it as intrinsically fair and mutually beneficial to employers and employees).

3 U.S. CONST. art. II, § 1, cl. 1.

4 *Id.* § 3.

5 *See id.* § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,

definitions section that might shed light on these sparse provisions. Their explication is left to judicial interpretation based, at least in part, on common usage at the time. As is always the case in novel ventures, the text is not sufficiently developed to resolve future legal disputes.

More specifically, Article II contains one void that cannot be easily filled. For all its attention to appointments, it does not contain a single word directed to the back end of the process: what powers does the President have to remove various executive officials when they clash with the President? A single sentence that provided that “the President shall (not) be able to remove all superior and inferior offices in the executive branch at will” could have resolved this question neatly, without appealing to the lofty reaches of political theory. Future generations could then decide whether the clear constitutional design had withstood the test of time.

The absence of clear guidance thus transforms the rules governing removal of executive branch officials into a hotly contested matter of constitutional interpretation. That interpretive quest takes place against the backdrop of textual provisions for a rigid separation of powers that speaks in categorical terms about the legislative, executive, and judicial branches. These separate branches are not autarkic because the Constitution also imposes a rich set of checks and balances that leave each branch autonomous in only some, but not all, of their activities. The extensive application of these two constraints reflects a clear preference for limited government, which is echoed in two other major constitutional themes: a federal system with limited and enumerated powers, and a Bill of Rights that entrenches substantial constitutional protection for individual rights, consistent with the theme of limited government, dealing with such topics as property, contract, speech, and religion.⁶

other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

6 For a discussion of a different constitutional structure, see Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357 (2007) (distinguishing between a formulation of well-designed governing institutions and an affirmative enumeration of rights as methods of protecting against government infringement upon fundamental liberties).

Regrettably, that original Lockean preference has not survived the constitutional transformations of the Progressive era.⁷ From the late-nineteenth century through the advent of the New Deal, the Supreme Court was busily knocking down the barriers that stood in the path of large government. On federalism, the key development was the enormous expansion of congressional power under the Commerce Clause. The early cases tended to exclude manufacture from the scope of the Commerce Clause.⁸ During the New Deal era, the clause was reinterpreted to allow extensive regulation of manufacture and agriculture.⁹ By dint of hard labor, it has expanded to the point where it now covers even solitary flies in isolated locales.¹⁰ One major theme has been the rise of the rational basis test in economic affairs, which renders off limits virtually any challenge to any general tax or regulation that Congress or the states could devise,¹¹ even as more powerful protections remain in place against most, but by no means all, government regulation of speech and religion.¹² Big government may not have been an original constitutional imperative, but it has become a permanent feature of our political landscape. Today, there is more business, for more permissible ends, at both the federal and state levels.

These huge demands have taken their toll on the original constitutional understanding of the executive power which, in turn, has placed real pressure on the President's power to remove members of the much-enlarged executive branch. This matter itself may look small compared to the weighty issues of the distribution of powers be-

⁷ For the transformation in connection with the nondelegation doctrine, see Douglas Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251 (2009).

⁸ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (reasoning that Congress lacks the power to regulate wholly intrastate manufacture of sugar under the Sherman Antitrust Act since control of the manufacture of a good affects its disposition only incidentally and indirectly).

⁹ The key mileposts on that journey are *Wickard v. Filburn*, 317 U.S. 111, 133 (1942), which upheld provisions of the Agricultural Adjustment Act, and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937), which upheld the National Labor Relations Act.

¹⁰ See, e.g., *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (upholding federal regulation of the Delhi Sands Flower-Loving Fly in the San Bernardino, California area under a very narrow reading of *United States v. Lopez*, 514 U.S. 549 (1995)).

¹¹ See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227–28 (1986) (upholding a statute that retroactively removed exit rights to plan participants).

¹² For one decision that reveals the tendency to allow progressive notions to justify the regulation of speech, see *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding Title I and II of the Bipartisan Campaign Reform Act of 2002).

tween the Congress and the President over issues of war and peace,¹³ yet the removal rules, although rarely dramatic, work in tandem with other parts of the Constitution. There is little doubt that the resolution of this issue is both intertwined with other questions—for example, the scope of the delegation doctrine—and critical in its own right of the day-to-day business of running a government. Let the ability of the President to fire his officials be subject to senatorial (or even congressional) approval, or otherwise limited in ways Congress specifies, and the balance of power shifts in favor of the legislature. Give the President the power to fire at will, and the distribution of power is more evenly balanced, because the Senate still has the power to deny its approval to the new nominee, who may be needed to execute key functions of government.

In order to get some handle on this complex set of issues, the remainder of this Article addresses two interrelated topics. In Part I, I ask why the system of separation of powers needs to place some strong limits on the presidential power to control operations within the executive branch. In order to do this, I compare the presidential system with two other organizations, one political and one not: the former is the English parliamentary system, and the latter is the modern corporation. After this exposition, the second portion of the Article examines how this basic arrangement tends to fall apart as the scale of government operations increases, leading to the rise of the inelegant compromises of the administrative state. In order to make good on this inquiry, it is necessary to move somewhat further afield, for the operation of the removal power is dependent on a large range of other topics, including the creation of the Article I courts, the establishment of independent administration agencies, and the operation of the nondelegation doctrine. In the end, I think that it is not possible to attack the use of administrative agencies to the extent that they engage in some cross between legislative and executive functions, but it is also unwise to allow independent administrative agencies to take on traditional judicial functions. Even at this late date, a reversal of that portion of the New Deal constitutional order seems appropriate.

13 For the textual tension, compare U.S. CONST. art. I, § 8, cl. 15–18 (setting out the Congressional power with respect to war and peace), with *id.* art. II, § 2, cl. 1 (setting forth the President's power as "Commander in Chief of the Army and Navy of the United States"). For my views, see Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005) (arguing that inflated claims for broad executive power over issues of national security have no textual or historical justification).

I. PRESIDENTIAL VERSUS PARLIAMENTARY AND CORPORATE SYSTEMS

It is a commonplace observation that there is much overlap between public and private systems of governance. In both settings, the law of contract, insofar as it deals with simple bilateral transactions like contracts of sale and hire, does not address the relevant issues: simple exchanges of labor or property, without more, do not give rise to government structures. But once parties to a voluntary agreement seek to create long-term arrangements, they find that complete contingent state contracts cannot begin to do the job. In their place, governance mechanisms must be created to allocate power to make future decisions when a unanimity of opinion on key issues is known to be unattainable. In this connection, the voluntary organizations in corporate or charitable institutions offer a useful point of departure for getting at the appropriate division of power in public organizations. Thus, the simple conveyance of a private home gradually gives way to the complex governance structure of the subdivision, cooperative, or condominium.¹⁴

To be sure, there are systematic differences between these different types of organizations. All charitable and for-profit institutions have the luxury of selecting their members by voluntary means. Their greater internal coherence makes it possible for them to define a mission on which members agree, both as to means and to ends. While these organizations can develop deep fissures over their lifetimes, especially in the face of unforeseen circumstances that inevitably crop up in complex organizations, political organizations have these tensions built in on the ground floor, because they must necessarily deal with the insistent claims of divergent groups that surely will not see eye-to-eye on some questions. The need to include diverse territories and groups leads, on average, to higher levels of heterogeneity in preferences, which can take ominous turns when the key divisions follow racial or ethnic lines. Both voluntary and political structures should rely on exit rights as a way to ease tension. Yet these are generally more costly to exercise in a political setting, for individuals cannot just resign their positions or sell shares to someone else; instead they must emigrate from the country, forced to leave their homes and communities and to abandon lifelong associations, often with no prospect of return.¹⁵ The combination of greater heteroge-

14 I trace this notion out in Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

15 For a discussion of these issues, see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 539-40 (1991)

neity and less effective exit rights often leads to greater factional tension and dissension, which in turn requires that well-designed governments put into place more extensive and better articulated constitutional safeguards to combat the ever-present risks of faction and intrigue. The private arrangements, therefore, do not offer a perfect precedent to the nettlesome riddles of political organization, but they still offer instructive analogies that it would be unwise to ignore.

It is therefore no surprise that in private associations and organizations, we see some elements that resonate in constitutional terms. The most common features of these organizations is that they have a board of directors that is responsible for setting policy and a chief executive officer (CEO) who is responsible for carrying out the directives of that board. That distinction is familiar to anyone who has read the justification for this institutional arrangement in the *Federalist Papers*.¹⁶ The board of directors, like the Congress, need not be in constant session to do its work. It can meet and recess on a regular basis, so that only a serious emergency requires it to be called back into session—which is one of the powers afforded to the President by the United States Constitution.¹⁷ That body, however, cannot handle the day-to-day execution of the laws and cannot take direct responsibility for the persons who administer it. Those jobs are left to the President.

But what governmental structures mediate the arrangement between these two branches? In most corporations, the salient feature is that the CEO serves at the will of the board of directors, which can remove him from office at any time and for any reason. That result holds even in those cases where the nominal appointment is for a term of years. That structural design matters, for unjust dismissal can

(describing limits on businesses' and residents' abilities to "exit" communities and insufficient constraints on municipal governments' rent-seeking behavior). Note that exit rights themselves are not guaranteed constitutionally, which limits the extent to which they can function as a protector of other kinds of rights. See Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 GEO. MASON L. REV. 293, 308–11 (1999) (arguing that exit rights are necessary to constrain government action but have no clear authority in the Federal Constitution).

16 See THE FEDERALIST NO. 23 (Alexander Hamilton) (justifying proposals to strengthen the powers of the federal government under the Federal Constitution).

17 See U.S. CONST. art. II, § 3 (“[H]e may, on extraordinary Occasions, convene both Houses, or either of them . . .”). It is also worth noting that the structure of the “Republican Form of Government” clause alludes to this distinction at the state level. See *id.* art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”).

lead to an obligation to pay the CEO and other high corporate officials compensation, perhaps in the form of a golden-parachute arrangement, to ensure that they step down from their positions without a fight.¹⁸ But those compensation arrangements are details; what really matters in this context are the structural issues. One well-established principle in American contract law is that employees do not get the remedy of specific performance when dismissed from their jobs.¹⁹ Courts uniformly and emphatically take the position that they will not try to supervise the discretionary decisions that are always involved in employment contracts. Courts also bridle at the thought that forced association on matters of fiduciary duties is an effective way to run a business. Indeed the only cases in which specific performance—or, more accurately, reinstatement—is allowed are under labor statutes where it is required precisely because the National Labor Relations Act imposes duties to bargain in good faith, which themselves strip an employer of the ability to walk away from the collective bargaining agreement without showing cause.²⁰

The decision to allow the board of directors to fire the CEO of any voluntary organization shapes the operation of the organization from top to bottom. Thus it is common in universities, for example, for the president to have an absolute say on the selection of a provost and of the deans of the key units. Similarly, in businesses, the CEO can usually appoint or fire at will all members of the executive suite. On these matters there may be some loose requirement for reporting major changes that the CEO has made inside the organization to the board, and it is often prudent for the president of the corporation or charitable institution to consult with key board members before making that decision. But the decisions to appoint and fire are absolute and are not subject to any formal kind of board control.

18 See, e.g., Eric Dash, *Has the Exit Sign Ever Looked So Good?*, N.Y. TIMES, Apr. 8, 2007, at C6 (describing high executive compensation awarded to CEOs who have resigned or been fired); Gretchen Morgenson, *The C.E.O.'s Parachute Cost What?*, N.Y. TIMES, Feb. 4, 2007, at C1 (discussing pressures to end shareholder reimbursements for CEO excise taxes paid on executive compensation).

19 See, e.g., *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 693 (Ch.) (denying specific performance of a labor contract but allowing an injunction against third party hiring). See also *N. Del. Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431, 432 (Del. Ch. 1968) (denying specific performance of a complex building contract, by which it would “become committed to supervising the carrying out of a massive, complex, and unfinished construction contract, a result which would necessarily follow as a consequence of ordering defendant to requisition laborers as prayed for”).

20 See National Labor Relations Act, 29 U.S.C. § 158(a)(5) (2006) (stating that an employer is prohibited from “refus[ing] to bargain collectively with the representatives of his employees”).

The reason for this distribution of power is clear. The ability of the board to fire the CEO at will supplies sufficient control of all the executive activities inside the corporation. Once the board fires one CEO, it is in a position to appoint another on an interim or permanent basis, who has the exact same powers to hire and fire as the outgoing CEO. There is, therefore, no way that the outgoing CEO can bind successors. Indeed, there is no way in which successful CEOs can transfer their karma to their successors upon their retirement. Hence, with a change in the guard, the only open question is whether second-tier officials who are caught in the undertow are entitled to some compensation by way of severance pay, which can be decided in advance.

There are, of course, some instructive ambiguities in the role of the corporate president. One major structural question is whether the corporate president is also the chairman of the board, which leads to greater integration between policy and execution but could easily stifle the independence of the board precisely when it is needed most.²¹ On this score, the general British preference—which reflects the structure of their parliamentary institutions—is to have a separate chairman of the board. The decided preference on the American side, at least until recently, has been to make the CEO the chairman of the board as well. So when ticklish issues of executive performance arise, the remainder of the board has to meet by itself, as it can do, to decide whether, how, and when to remove the CEO. But for all these variations, the key design feature of this system is that the CEO is given near-absolute power in the running of the business precisely because he is subject to removal from office at the pleasure of the board.

This system of private control is reflected in the British parliamentary system, where the Prime Minister has absolute control over the members of his cabinet, subject, of course, to his own removal if he loses a vote of confidence in Parliament or if he is voted out of office in a public election. The close connection between the cabinet and the Parliament creates an immediate need for a strong civil service to provide continuity that is lacking with political change—a feature that is also necessary in the American system due to its current massive proportions. But given the power of removing the Prime Minister, there is no elaborate system for the confirmation of new govern-

21 See, e.g., Joel Seligman, *A Modest Revolution in Corporate Governance*, 80 NOTRE DAME L. REV. 1159, 1175–79 (2005) (explaining reasons for SEC requirements to separate the role of the CEO from the role of the Chairman of the Board).

ment officials by the Parliament (or even one House), nor any say in their removal. The entire process follows well-established and convenient corporate principles. Whatever differences emerge between public and private institutions are taken into account elsewhere in the parliamentary system.

On this account, enormous structural consequences attach to the Founders' decision to maintain a strict system of separation of powers, subject to appropriate checks and balances, as an indispensable safeguard against tyranny.²² To make good on that agenda, it was strictly necessary to build into the constitutional structure an independent executive branch headed by a President with a definite term who is not answerable to Congress, except through impeachment, the ultimate "for cause" dismissal that requires proof of the commission of a high crime or misdemeanor before a Senate trial upon prosecution by the House of Representatives. As grounds for impeachment are only rarely available, the necessity arises to develop some more modest mechanisms to keep the President in line during his term of office. Quite simply, absolute power does not mesh well with a protected four-year term. One possible approach, not taken by the federal Constitution, is to develop an unbundled executive, so that the President has only some of the executive powers.²³ This strategy is often adopted at the state level, where the Attorney General is independent of the Governor.²⁴

There is little doubt that this division is the source of some profound consequences, as the investigative power of the Attorney General is often more aggressively pursued in these contexts. One need think only of such notable (and controversial) Attorneys General as Eliot Spitzer of New York to see how far this can go.

Whether this division of power makes sense is hard to say. It is clear that part of the impulse for creating special prosecutors not subject to the direct control of the President rested on the perception that presidential control over the office of the Attorney General raised a conflict of interest that made it difficult to investigate poten-

22 See THE FEDERALIST NO. 48 (James Madison) (arguing that separation of powers requires empowering the legislative, executive, and judicial branches to exercise constitutional control over each other); see also GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 1-22 (1997) (providing an overview of the separation of powers doctrine and arguing for its flexible application).

23 See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) (theorizing that vesting various executive powers in several directly elected executive officials would yield better-performing executives).

24 See *id.* ("Most states directly elect state attorneys general . . .").

tial illegalities in the executive branch.²⁵ Yet the failure of the institution of the Independent Counsel speaks of a second lesson, which is that uncontrolled individuals holding investigative power could themselves engage in abusive investigations as well, which, in large measure, is why the office died for political reasons in 1999.

Yet historically, the American Constitution did not take that path. Instead, it concentrated all executive power in a single official and, in response, sought to build a structure that makes sensible adjustments in order to take into account its novel vesting provisions. Its most conspicuous feature is that the President is subject to limitations on the content of his duty, that is, to take care that the law be faithfully executed. Some instances require a performance, often discretionary, by other individuals in the executive branch—note the role of the word “be” in this formulation—whose charges are given to them by Congress, not by the President.

This formal limitation on presidential power is not easy to enforce in light of the inevitable disputes of what is required by the law that the President must execute. There are some black and white commands, but even before the rise of the modern administrative state, government officials necessarily had to discharge discretionary functions. That was why Chief Justice Marshall took such pains to note in *Marbury v. Madison* that the writ of mandamus did not apply to those circumstances—a holding that remains good law to the present day.²⁶

Faced with the challenge of control, the Constitution veered off into unexplored territory by introducing a powerful limitation: that the President’s appointment of key senior officials must be approved by the Senate—a restriction that is rejected in all corporate and parliamentary systems. A striking feature of this system of rejection is that it is done through a straight majority vote. There is no “for cause” requirement that the Senate must invoke to explain why it refuses to issue its consent. This is surely a commendable design feature given the initial structural decision to allow the President to serve for a fixed term of four years. The Senate is a collective body

25 In *Morrison v. Olson*, 487 U.S. 654, 660 (1988), the Court upheld the constitutionality of independent counsel provision of the Ethics in Government Act of 1978. Justice Scalia issued a prescient dissent, arguing that the provision violates the separation of powers doctrine by authorizing Congress to demand the Attorney General to investigate alleged executive branch misconduct. *See id.* at 703 (Scalia, J., dissenting) (“Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter dispute between the President and the Legislative Branch.”).

26 5 U.S. (1 Cranch) 137, 170 (1803) (stating that courts do not have authority to question how executive officers perform discretionary duties).

and reasons that appeal to some members may not be persuasive to others. Each Senator can speak his or her own piece on the subject before or after the vote is taken. Any effort to cobble together some public standard to decide the “for cause” question would fall prey to the inanities of public deliberation by making it hard to reject someone without seeking to defame his character or fitness to serve as a public official. Disagreements in policy are not precluded in this context as a matter of law. The extent to which these are acted upon by individual Senators, or indeed by the Senate as a whole, is a question for political wisdom—sometimes in short supply—and not for legal oversight. The use of the advice and consent standard thus creates a wide space for soft institutional practices.

Nor is the American Constitution unique on this particularity. The College of Cardinals also chooses the Pope by majority vote, cast without explanation. The advantage of the President in any tug of war with the Senate lies in his ability to win over enough members of the Senate to have his way, no questions asked. Sooner or later the positions will be filled, and, if not, the interim appointments are left to the President, which gives him a not-so-subtle advantage over the Senate.²⁷

This rigid system of senatorial approval applies only to senior officers of the government. As with all organizations, the question of who fills the non-policy positions is far less weighty and, on this question, *Congress* is entitled to diminish the power of its Senate: “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”²⁸ It is worth noting that the relaxation of control is not for the Senate to do on its own, but for both Houses to accomplish together “by Law,” which is subject to the President’s veto.²⁹

This cessation of power is not a one-way ratchet. Presumably, any statute that offers power to the President could be repealed, subject to a presidential veto and its override. In addition, these second-tier appointments necessarily add an extra layer of complexity to the theory of the unitary executive. The Congress can choose to vest these

²⁷ See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

²⁸ *Id.* at cl. 2.

²⁹ See U.S. CONST. art. I, § 7, cl. 2 (“Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .”).

powers in the heads of departments³⁰ that can exercise them without the approval or cooperation of the President, or in the courts that enjoy by design a very large measure of independence from the political branches. This subappointment clause, as it were, thus permits the Congress to dial up or dial down its powers relative to the other branches. The mass of confirmations that is routinely required, and often delayed, provides some evidence that Congress—or at least the Senate—does not wish to surrender its power easily, even at the cost of diminishing the effectiveness of key appointments who operate only with provisional authority.³¹

At the same time, the creation of an independent civil service that is not answerable to the President fits only uneasily in the constitutional scheme, to say the least. The independence of the civil service was stoutly defended by Chief Justice Taft in *Myers v. United States* as a correction against the “spoils system,” which allowed the victorious candidate to displace all rank and file employees of the previous administration.³² But that entire institutional arrangement, however wise, looks insecure when set against the constitutional text. The first point of uncertainty is who counts as an “inferior officer.” The opposition to their “superior officers” (a term never used in the Constitution) seems clear enough. But the term “officer” itself suggests only a subclass of all government employees who are not senior officials. By way of analogy, the inferior officers of a corporation do not include the receptionists or the custodial staffs, given their total absence of policy-making functions.³³ For those persons, it looks as though the Appointments Clause has nothing to say at all, which leaves open the question as to who exercises authority in the appointment and termination of executive branch employees who do not rise up to the level of officers. On this question, the mystery only deepens when we look at the matter through the lens of the Necessary and Proper Clause, which grants Congress the power “[t]o make all Laws which shall be

³⁰ Notably, no departments are specified by name in the Constitution.

³¹ For an exhaustive account of the difficulties in staffing key agency positions today, see Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009) (noting the difficulties in filling the 1,100 positions that now require Senate confirmation in both the executive branch and independent agencies).

³² 272 U.S. 52, 173–74 (1926) (defending the President’s unchecked power to remove civil officers as being consistent with a merit system).

³³ For a private law comparison, see Rules and Regulations Under the Securities Exchange Act of 1934, 17 C.F.R. § 240.16a-1(f) (2009) (“The term ‘officer’ shall mean an issuer’s president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), . . . or any other person who performs similar policy-making functions for the issuer.”).

necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁴

This Clause clearly authorizes Congress to allow the President to hire employees at all levels to staff the executive branch, for how else could he discharge his duties? But it is a different question as to whether it authorizes Congress to impose civil service requirements on these employees, for it is far from apparent how these restrictions work to assist the President “for carrying into Execution” any of his constitutional powers. To the contrary, the Necessary and Proper Clause looks to be a limitation on that ability, for why is it appropriate for Congress to intrude in the internal affairs of the executive branch?³⁵ The expansive reading that is given to the Clause usually relates to congressional powers to regulate or create, as it did with the national bank at issue in *McCulloch*. That case did not involve congressional encroachment on the executive branch. At stake was “only” the expansion of federal powers relative to the states. But inter-branch encroachment comes to the fore when the Necessary and Proper Clause is invoked to rebalance powers between the branches of the federal government.

Given that no enumerated power authorizes Congress to regulate the internal affairs of the executive branch, just where does Congress get the power to impose a civil service system on executive branch operations? If anything, it looks as though there is an implicit congressional duty to authorize payment for (at least some) employees in the executive branch, regardless of how the President chooses to organize it. After all, if Congress did not authorize the hiring of any executive branch employees at all, the entire government could come crashing down. Once again, the unarticulated gaps in the Constitution scheme loom as large as its explicit provisions, which is why a close analysis leaves the Civil Service Act³⁶ in some kind of structural limbo, notwithstanding Chief Justice Taft’s protestations to the contrary. The lesson is clear: the harder we push on matters of government structure, the less guidance that we can wring out of the Consti-

³⁴ U.S. CONST. art. I, § 8, cl. 18.

³⁵ The standard view of this clause is that “necessary and proper” should be translated as “appropriate.” See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 356 (1819) (stating that Congress was given powers that are “useful and appropriate” to enforce the specific, articulated powers it was given). For a devastating critique, see Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 326–30 (1993) (stressing the word “proper” as a denial of delegated power).

³⁶ Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (regulating the civil service of the United States).

tution's text. Chief Justice Taft carried the day not because of his superior textual arguments, but because his presidential aura legitimated the strong critique of the spoils system that led to the adoption of the Civil Service Act. Such is the complexity of the underlying organizational problem that it is hard to make any confident global assessment about how well these reforms have fared.

Nor is there anything that dispels the murk when the discussion turns to the status of the inferior officers. Although Congress has the power to decide who shall make the appointment, the Constitution is once again silent on the question of removal. If it is regarded as inherent in the President's "take care" powers that he be able to remove his chief, or superior, officers at will, why does that removal power not remain with the President, or the heads of the departments as the case may be, when legislation provides that Senate confirmation is not required? The case law on this subject emphatically states that Congress can pass laws that require the Senate's consent for removal in these positions.³⁷

United States v. Perkins raised the question of whether the plaintiff, a cadet engineer, could be dismissed by the Secretary of the Navy when his services were no longer required.³⁸ *Perkins* explicitly passed on the question of whether the Senate could restrict the removal of officers who were appointed only with its advice and consent, and continued as follows:

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.³⁹

This argument relies heavily on the greater/lesser power argument that works well in ordinary business situations: the power to decide whether or not to make an offer gives the offeror the power to

³⁷ See, e.g., *United States v. Perkins*, 116 U.S. 483, 485 (1886) (holding that Congress has constitutional authority to regulate the removal of inferior officers).

³⁸ *Id.* at 483.

³⁹ *Id.* at 485 (internal quotation marks omitted); see also CALABRESI & YOO, *supra* note 1, at 214–15 (asserting that the holding of *Perkins* "makes eminent good sense as applied to the removal power of heads of departments").

impose conditions on that offer.⁴⁰ Without this principle, it is not possible to develop ordinary commerce in competitive markets. But by the same token, this full-throated version of freedom of contract does *not* work where either private parties or governments exercise monopoly power, as they so often do. The power to exclude from the roads does not include the lesser power to reserve their use only to Republicans or Democrats, men or women, even if it does allow the state to require parties to a road accident to submit to its resolution within the jurisdiction where it takes place.⁴¹ And the same set of implicit limitations apply to structural issues. The power to confirm or reject a nominee to the Supreme Court, for example, does not confer on the Senate the power to appoint a nominee to that seat on condition that he or she refuse to participate in antitrust or affirmative action cases. Repeated application of conditional approvals will gut the operational capacities of any appointment. The decision is necessarily an all-or-nothing choice, for otherwise the separation of powers is at an end.

That same risk of interbranch encroachment arises in *Perkins*. It makes no sense to hold that Congress, through legislation, cannot limit the President's power of removal for officers that are appointed through the confirmation process, but that it can (even over a presidential veto) prevent the President and his key appointees from removing at will inferior employees without the consent of the Senate, or indeed the House of Representatives as well. Congress's ability to either allow or force the President to make appointments without Senate confirmation does not allow Congress to strip him of the power of removal of inferior officers, whose cooperation is needed to make the executive branch respond to his wishes. There is no apparent reason why Congress can unilaterally increase its powers at the back end by reducing them at the front.

It is no response, moreover, to say that the removal power does not matter because the decisions of inferior officers can generally be overridden by their superior officers through the normal chain of command. That claim is idle when an inferior officer is entitled to keep his post, as in *Perkins*. Nor does that response address the situation where Congress vests particular powers in discrete officers within the executive branch other than the President. It has long been settled, for example, that the Congress may pass legislation that confers

⁴⁰ For my extensive discussion, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993).

⁴¹ See generally *id.* at 161–70.

certain powers on the Secretary of the Treasury that the President cannot exercise in his personal capacity. Thus in the famous dispute over the Bank of the United States, President Andrew Jackson did not have the power to withdraw federal funds from the Bank; nor did he have the power to order the Secretary of the Treasury to do so. But he did have the power to remove any Secretary of Treasury who refused to do so, and to appoint, but only with the advice and consent of the Senate, someone else to do his bidding. Accordingly, Jackson fired first Louis McLane and then William Duane before he appointed Roger Taney, who was prepared to do his bidding.⁴² Against that backdrop it seems highly unlikely that Congress would vest powers in inferior officers in ways that bypass the President altogether. It is almost a contradiction in terms to say that neither the President nor any of his senior officers are empowered either to give direct orders to subordinates or to remove them from office, without the consent of the Senate, or even the entire Congress. Any purported insulation of so-called inferior officers counts as a complete inversion of the constitutional hierarchy that subordinates key aspects of executive power to the will of Congress. If Congress wants to reassert some control over inferior officials, let it repeal any legislation that allows these appointments to be made by the senior executive branch officials acting on their own. Otherwise the doctrine of unconstitutional conditions, which emerged after *Perkins* was decided, undermines the soundness of that decision.

II. THE BREAKDOWN OF THE ORIGINAL SYSTEM

Thus far I have concentrated on the role of the removal power in its relationship to the appointment power of the President under the original constitutional design. The second part of the problem asks how well the unitary executive survives in modern times. At this point, the issue is not one of textual interpretation of the key points in Article II. Rather the issue is what pressures are placed on the removal power against the background of other major changes in our constitutional system wrought during and since the tumultuous 1930s. On this score, it is quite clear that modern times demand,

⁴² For discussion, see Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705–07 (2007). I think that Strauss overreads this history in thinking that it supplies any textual support for the constitutional legitimacy of independent agencies. See Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491, 503 (2008) ("The creation of the independent administrative body . . . will increase the size and power of the administrative state in ways that classical liberals would find unacceptable.").

even in the most modest of circumstances, a size of the federal government far larger and more complex than any contemplated by the Framers. Simple increases in population and in the number of states are themselves sufficient to drive that result. And these effects are in turn compounded by the huge expansion in the scope of federal power through the New Deal interpretation of the Commerce Clause.

These changes matter because the Constitution does not create a set of institutional arrangements for allocating federal authority that are easily scalable. It is not as though all of the basic relationships in the original Constitution remain constant when the government it creates repeatedly doubles and redoubles in size. Stated otherwise, what might be an efficient distribution of power for a small government turns out to be an overrigid distribution of power for an expanded state. As constitutional amendments are hard to come by, the adjustments in question are made by judicial accommodations that sometimes make sense, but sometimes do not. To show this problem, it is worthwhile to take a small digression to deal with one issue at the line between congressional and executive power, which is the impeachment process within Congress, where the scale issues have imposed stress on the original constitutional framework. Thereafter, it is useful to see how the problem of expanded government size and mission puts added stress on the original system of separation of powers, all of which deal with various questions of delegation that increase the number of ways in which the federal government can act. Some of these involve delegations of powers to Article I courts and to administrative agencies. The former does not properly speaking involve the executive branch, but it must be explored as a counterpoint to the key issue on executive power, namely the delegation of authority to administrative agencies, which manifestly does. Thereafter, the analysis concludes with a discussion of congressional delegations to the President, in order to develop some working explanation of the distribution of issues between the executive branch proper and the independent administrative agencies.

A. Impeachment

The practices governing impeachment offer an instructive way to look at the scale problem. When the legislature has few matters to consider, members of the House and Senate can make a pretense of keeping up with the work. But as the number of matters increase, it becomes ever more necessary to reduce the amount of work that is done by each house as a whole and, necessarily, to increase the amount of work that is delegated first to committee, and then to

committee staffers. In many instances, this process simply looks like a reorganization of workload that was contemplated by the Constitution, which wisely left each house the master of its own internal governance. But in some instances, the efforts at delegation run up against constitutional limitations. Thus on matters of impeachment of judicial officials, for example, one question is whether the trial has to be before the Senate as a whole. The text itself provides that:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.⁴³

The common procedure today in routine impeachments for federal judges is to allow the heavy work to be decided by a committee, which then refers the matter out to the full Senate for a vote. But this hardly seems to meet the standards set out in the Constitution, for the Senate does not seem to be “sitting for that Purpose” when many of its members are excluded from the deliberations. The last sentence of this Clause does not require every Senator to be present, requiring that the impeachment takes place with the concurrence of the vote of two thirds of present members (which means that staying away in protest reduces the number of votes needed to secure the conviction). Yet by the same token, the sentence seems to suggest that all Senators have the right to be present, which is not the case when the initial vetting of the case is reserved to a committee. The same conclusion comes from an ordinary reading of the term “try.” A court would not be sitting for the purposes of a case if most of the judges who were responsible for issuing its ruling never heard the oral argument. Only in very limited circumstances can appellate judges participate in cases where they were not present at oral argument. And it is unheard of to allow district court judges to try cases in absentia. So it looks as though all Senators should have the right to participate in the proceedings.

That system, which might have worked well with thirty Senators and modest amounts of business, is not likely to work at all today. So when the issue came to a head in *Nixon v. United States*, the Supreme Court solemnly pronounced the matter a political question,⁴⁴ which was a polite way of saying that, on this occasion at least, it adopted the narrow view of *Marbury v. Madison*, under which the Court would not

⁴³ U.S. CONST. art. I, § 3, cl. 6.

⁴⁴ 506 U.S. 224, 235 (1993) (“Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive . . .”).

interfere with the internal operations of a coordinate branch of government.⁴⁵ In this instance, the strategy of nonintervention worked well, because once the impeachment is done with, its results do not influence any structural interaction with the two other branches of government. But for a conscientious Senator, nothing turns on the refusal of the Supreme Court to interpret the meaning of the phrase “try impeachment;” it does not end the inquiry into the constitutionality of the Senate’s procedures, which should have led to the same interpretive result: the Senate has to sit as a court of the whole to hear the case. But the functional arguments proved in the end too strong as the full Senate cannot operate coherently in that manner, constantly forcing matters on lesser bodies. The modern practice should sit well for functionalists, but not for originalists, and for the same reason. We have here a set of changed circumstances, without any obvious political valence, that renders the older procedures suspect precisely because they are not scalable.

The same kind of issue applies with respect to the executive branch, which under the current Constitution is asked to discharge countless tasks that were not in the contemplation of the Framers. The vast increase in the scale of its operation requires a huge expansion in its personnel, and a concomitant increase in the level of discretion it exercises. Cabining the executive branch in its original form would therefore impose enormous span of control problems on its operation. If the executive were to implement the broad mandates characteristic of the welfare state, it would also work to increase the power of the President vis-à-vis the Congress. Indeed, in large part the creation of independent agencies, which are said to fall within the executive branch, was an effort to prevent that shift in power by limiting the power of the President to remove agency members from office without some showing of cause.

Historically, these tensions manifested themselves in connection with the organization of the judicial power. On this score, the battleground is set by the explicit provisions of Article III that stipulate that all federal judges shall have lifetime tenure—technically on good behavior—and that their salary cannot be diminished within their term of office.⁴⁶ It takes little imagination to realize that even as the base of the pyramid continues to expand almost without end, the top of the pyramid consists of *one* Supreme Court that cannot keep up with the volume of work below, no matter how energetic it becomes. Yet there

⁴⁵ See 5 U.S. (1 Cranch) 137 (1803).

⁴⁶ U.S. CONST. art. III, § 1.

is real resistance to following the practices of other courts, which would allow the Supreme Court (at least in nonconstitutional cases) to sit in panels, for fear that the composition of the panel will have a powerful influence on the direction of the law. These immense practical pressures are born, in part, of deep structural transformations and in equal measure of short-term political concerns.

It is no mystery why the entire enterprise is fraught with such difficulty. Figuring out these twists and turns with the creation of such constitutional oxymorons as independent agencies in the executive branch that are “quasi-legislative” and “quasi-judicial” is the next task of this Article.⁴⁷ The first section traces the expansion of the government powers at state levels to set the stage for the similar transformation at the federal level. Thereafter, it is necessary to look at relations across all three branches to develop some understanding of the transformation of the position of the executive, and the unilateral power of removal. The second section then examines the complexities of the commission model at the federal level in connection with both Article I courts and independent agencies, and concludes with a discussion of the complex interactions between Congress and the executive branch.

B. State and Federal Commissions

The structure of expanded government is not unique to the federal level, for a parallel expansion in government also took place at the state level, whose actions were unencumbered by the limitations found in the federal constitution. As the states expanded their activities in the late-nineteenth and early-twentieth centuries, they relied on a wide range of new and specialized institutions. These actions did not go unopposed. Perhaps the most famous example of judicial resistance was *Ives v. South Buffalo Railway Co.*,⁴⁸ which represented a confused effort to invoke common law notions of tort liability to strike down the initial New York Workmen’s Compensation Act under state constitutional law. The New York statute in its original form did not make use of any specialized commission to hear these cases, so that the case raised no structural issues at the state level.⁴⁹ These

⁴⁷ These terms are found in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), which described the FTC as “neither political nor executive, but predominantly quasi-judicial and quasi-legislative.” *Id.* at 624.

⁴⁸ 94 N.E. 431 (N.Y. 1911).

⁴⁹ *See* New York Labor Law of 1910, art. 14a, § 219d, *quoted in Ives*, 94 N.E. at 435 (stating that a dispute over workers’ compensation could be settled through the common law court system).

objections largely rested on uneasiness with the displacement of the traditional common law standards of liability. New York promptly amended its constitution to allow for this innovation, which was promptly challenged under the United States Constitution, where it was upheld against takings and due process challenges in *New York Central Railroad Co. v. White*.⁵⁰

White had nothing to say about the use of specialized compensation commissions at the state level. That structural question surfaced in 1932 when the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act came before the Supreme Court in *Crowell v. Benson*.⁵¹ Within our system of federal powers, could a workmen's compensation commission be established to decide these cases? The federal challenge was whether the Act conferred judicial power on a nonjudicial body. The early learning on this subject appeared to state that all judicial powers had to remain with the courts, and no other powers could be conferred on them.⁵² To be sure, by the time *Crowell* was decided, the austere regime of *Murray's Lessee v. Hoboken Land & Improvement Co.* had already been eroded with the inexorable expansion of the administrative state. *Murray's Lessee* had recognized a limited exception to its sharp departmentalism in cases of "[e]quitable claims to land by the inhabitants of ceded territories,"⁵³ which is best explained by the highly politicized nature of any dispute that necessarily involves land titles derived from grants by the United States.⁵⁴

By 1932, however, the definition of a public right had expanded to accommodate the reality of the new administrative state. *Crowell* involved a specialized federal workmen's compensation scheme. Chief Justice Hughes's rationale for sustaining these commissions had no modest goal: it was intended to legitimate the full range of specialized institutional arrangements that had developed since the

50 243 U.S. 188, 209 (1917) (holding that the exclusive workers' compensation system created under the New York Workmen's Compensation Law of 1913 was constitutional).

51 285 U.S. 22 (1932).

52 See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) ("To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.").

53 *Id.*

54 For such a case, see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The case cited in *Murray's Lessee* was *Foley v. Harrison*, 56 U.S. (15 How.) 433 (1853), which involved grants of federal lands to each of the states for internal improvements. See *Murray's Lessee*, 59 U.S. at 284.

passage of the Interstate Commerce Act in 1887, including, most notably, the Interstate Commerce Commission. Public rights thus included such matters as “foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”⁵⁵ All of these issues could be brought before administrative tribunals without question. But the ordinary workers’ compensation dispute turned on money owed for workplace injuries, which could not simply be removed from the Article III courts by fiat. At this point, Chief Justice Hughes adopted an inelegant compromise whereby the basic jurisdictional facts in any admiralty case—did the dispute occur at a location covered by courts of admiralty, and was the accident one that arose out of the course of that admiralty jurisdiction?—were subject to *de novo* review in federal court. On the other hand, questions on the extent of injury and level of compensation could be decided exclusively within the commission because no jurisdictional issues were implicated.

It is important to recall how this hairsplitting came to pass by reverting to the basic issue of the tripartite constitutional structure in a world where the effectiveness of the judicial system is heavily dependent on size. When the public administrative load is small, separation of powers works pretty well. But the huge expansion in government power makes it hard to ramp up the system to meet the additional load. Commissions are a sensible way of getting many of the cases out of the judicial system. The logic for doing this within the framework of the federal government is equivalent to the logic for doing it within the states. And once the states took that path, why deny that option to the federal government? As the size of the federal district courts expands, the pressure rises to expand the size or number of the courts of appeals. But there is no similar adjustment at the top, as the number of Supreme Courts is frozen at one, no matter how many rivers feed into it.

On this point, the stakes in *Crowell* were in fact higher than the new compensation commissions due to two other noteworthy developments. The first of these is the rise of Article I courts, in which some element of the judicial power is vested in judges who do not have life tenure and who cannot, therefore, be located in Article III courts. Tax court and bankruptcy court judges fall under that description and their appointments are for long, but limited, terms—

55 *Crowell*, 285 U.S. at 51.

fifteen years for the tax court⁵⁶ and fourteen years for the bankruptcy court. The second concerns the rise of independent administrative agencies that fit nowhere within the current tripartite system.

C. Article I Courts

The United States Tax Court began life as the U.S. Board of Tax Appeals under the Revenue Act of 1924.⁵⁷ Its creation was marked by a sustained terminological effort to insulate these courts from constitutional attack. That is why the Tax Board of Appeals was originally staffed with “members,” not “judges”—a state of affairs that lasted until the Revenue Act of 1942,⁵⁸ which upgraded the low-status Board into the Tax Court of the United States, whose members were upgraded to “judges,” and whose chairman became the “Presiding Judge.”

The Bankruptcy Courts also traveled on a long and complex path, culminating in the passage of the Bankruptcy Reform Act of 1978.⁵⁹ The 1898 Bankruptcy Act created the new office of bankruptcy referee.⁶⁰ These referees were appointed by district court judges and served for two-year terms, subject to removal at any time. Referees had final word on administrative matters, but their substantive decisions were subject to review by the district court judges who appointed them. By 1946, their term of office had extended to six years, and the transformation to bankruptcy judges was completed in the 1978 Reform Act, when the traditional administrative functions were split off and turned over to the Department of Justice.

The 1978 Bankruptcy Act was conscious of the Article I difficulty, which it sought to meet as follows. For the core functions of bankruptcy, broadly defined, the only appeal from a bankruptcy court is to the courts of appeals. Noncore functions are subject to *de novo* review in the district courts on the theory that, historically, they have no

56 See Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336. The difference between a tribunal and court is that tribunals are usually charged with adjudication for some specific incident only, after which they are disbanded.

57 *Id.*

58 Revenue Act of 1942, ch. 619, § 504(a), Pub. L. No. 77-753, 56 Stat. 798, 957.

59 See generally Prudence Beatty Abram & Andrew DeNatale, *From Referee in Bankruptcy to Bankruptcy Judge: A Century of Change in the Second Circuit*, in THE DEVELOPMENT OF BANKRUPTCY & REORGANIZATION LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES 61 (U.S. Courts for the Second Circuit Comm. on History & Commemorative Events ed., 1995); Fed. Judicial Ctr., Federal Judicial History: Bankruptcy Referees, http://www.fjc.gov/history/home.nsf/page/referees_bdy (last visited Jan. 29, 2010).

60 Act of July 1, 1898, ch. 1, § 1(a)(21), 30 Stat. 544, 545.

special expertise that justifies their elevation to Article I status.⁶¹ The direct de novo review in district court shows the influence of *Crowell*, because an Article III court would be able to review the entire matter. The fix should not work, given that bankruptcy courts also discharge a wide array of functions that normally fall to courts of first instance under Article III.

It is understandable, therefore, that the 1978 Act was held unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁶² Textually, it is hard to find a principled defense of these oxymoronic Article I courts. The ostensible authority for creating these bodies is found in Article I, Section 8, Clause 9, which gives Congress the power “to constitute tribunals inferior to the Supreme Court.” The term “tribunal” appears only in one place in the Constitution, where it assumes a critical role. The basic structure of Article III calls for the creation of the Supreme Court. It also allows for the creation of whatever inferior courts the Congress shall ordain and establish. Article I, Section 8, Clause 9 authorizes Congress to create those courts. Without it, Congress does not have any explicit power in Article I to fill out the federal system. To the extent, therefore, that this provision is the *only* source of legislative authority for creating tax or bankruptcy courts, it gives no shelter to those who want to free these courts from the restrictions found in Article III.

To be sure, the term “tribunal” sometimes refers in popular speech to bodies that are brought into existence to deal with some short term problem, after which they are disbanded. One such body was the War Claims Commission, formed in 1948 to deal with compensation claims for internees, prisoners, and religious organizations at the conclusion of World War II. That Commission had to wrap up its business within three years after the close of its filing period.⁶³ This Commission (which does not use the word “tribunal”) has the twin hallmarks of limited duration and specialized docket. In these cases, an argument can be made that the commission “members”—a replay of the verbal strategy adopted with the Board of Tax Appeals—need not be federal judges with lifetime tenure. It can be persons who are appointed by the President (and in the case of the War

61 For discussion of the structure of bankruptcy law, see Chapter 1 of DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* (rev. ed. 1993).

62 458 U.S. 50, 87 (1982).

63 See War Claims Act of 1948, ch. 826, § 2(d), 62 Stat. 1240, 1241 (“The Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims, but in no event later than three years after the expiration of such time.”).

Claims Commission, confirmed by the Senate) for the duration of the Commission itself.

These specialized commissions were, and are, created in response to a serious peak-load problem. It is unwise to appoint lots of additional federal judges to handle this overload when the burden will be over in a couple of years. It does not follow, however, that there is no restraint on the staffing of these bodies. It would have been unacceptable, for example, to allow the appointment of commissioners for one-year terms, subject to renewal, given the obvious threat to judicial independence. That said, it is hard to shoehorn either the tax or the bankruptcy courts into any narrow short-term tribunal exception to lifetime tenure for federal judges, assuming that it properly exists. The brute fact is that both courts are a permanent feature of our judicial landscape. Once any tribunal becomes perpetual, terminology does not matter: the terms of its judges or members should be for life under Article III. Otherwise, district courts could have their work siphoned off into tribunals until the requirements of Article III become a dead letter, as we have specialized bodies to deal with government claims, patents, copyrights, condemnations, communications, labor, and so on down the line.

As an originalist matter, therefore, the answer seems clear: we cannot have these specialized tribunals exist outside of Article III. But there they sit, and the question to ask is whether the harm is so great that one should seek to undo the damage. On this score, some weight has to be attached to the soundness of the initial provision and the nature of the subsequent incursion. Instructively, Article I judges are all guaranteed their compensation during their term of office, and for obvious reasons. The sticking point involves *de facto* life tenure for federal judges on good behavior. The Constitution incorporated this provision, like the compensation provision, in order to ensure the independence of judges from encroachment by the other two branches. That end is highly laudable, but the constitutional choice of means has turned out to be, in my judgment, highly flawed. Not surprisingly, it has been subject to all sorts of powerful criticisms and evasions.⁶⁴ Life tenure allows senile judges to sit on the court in their dotage, and it goes against the principle of rotation which brings fresh blood into public offices. A system that allowed judges to work until some specified retirement age—say, seventy years of age—

⁶⁴ For some sense of the widespread dissatisfaction with the current system, see Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 435 (Roger C. Cramton & Paul D. Carrington eds., 2006).

or which restricts them to long-term appointments—say, fifteen years—goes a long way to preserve independence while avoiding the risks associated with (de facto) lifetime tenure.

It is, of course, no accident that many state courts have moved to systems of this sort. And it is no quiet irony that the maximum age limit for state court judges has been subject to the (dubious) claim that it violates the federal Age Discrimination in Employment Act.⁶⁵ At bottom, however, imposing term limits for these other judges counts as an unambiguous *improvement* on the original constitutional scheme, which now comes at the price of doctrinal impurity. But no one claims that these developments create systemic risks, even if they oppose the division across different classes of federal judges, given the high level of independence that these judges retain.

D. Independent Agencies

Side by side with the rise of Article I judges is the validation of independent administrative agencies whose members do not serve at the will of the President. The use of administrative agencies started, of course, with the passage of the Interstate Commerce Act of 1887, but the issue did not come to a head in the Supreme Court until the decision in *Humphrey's Executor v. United States*.⁶⁶ In 1914, Congress established the Federal Trade Commission as part of Woodrow Wilson's general reform efforts to control "unfair methods of competition."⁶⁷ The members of that panel were removable only for-cause, or more precisely, "for inefficiency, neglect of duty, or malfeasance in office."⁶⁸ Justice Sutherland upheld the statutory language, distinguishing *Myers* on the ground that it dealt with "purely executive officers," and thus did not extend to FTC Commissioners who are not executive department officials at all, but who act "quasi-legislatively and in part quasi-judicially."⁶⁹ So the question then arises, just where are they located? If they are not executive branch officials, then by elimination they must belong to either the legislative or judicial branch. Yet both of these suggestions can be dismissed out of hand. Administrators have not been elected to their offices, and are not members of the

65 See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 484–85 (1991) (holding that the ADEA did not bind the states with respect to its own employees in the absence of a clear statement to that effect). For my defense of that position, see Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, in *REFORMING THE COURT*, *supra* note 64, at 415.

66 295 U.S. 602 (1935).

67 Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006).

68 *Id.* § 41.

69 *Humphrey's Executor*, 295 U.S. at 627–28.

House or Senate. And they are certainly not judges with lifetime tenure. So we thus created a fourth branch of government, with no constitutional pedigree to handle the distinctive mixture of duties of an FTC commissioner. Yet once the dam breaks, imitation follows as a matter of course. Thus, for example, the National Labor Relations Act created a board of three members, serving for a term of five years each, with its chairman designated by the President.⁷⁰

As an originalist matter, the case against independent administrative agencies is at least as strong as the case against Article I judges: neither has a constitutional home. It might be tempting, therefore, to assume that whatever historical arguments give a free pass to Article I judges today should do the same for administrative agencies. But here, as elsewhere, this originalist approach faces the same difficulty of whether long usage should insulate the practices from constitutional review. The faint-hearted would surely say yes, on the grounds that the entire administrative state is equally entrenched, and agencies perhaps more so than Article I courts. Indeed giving life time tenure to Article I judges would create only a small dent in the current judicial structure. The same could hardly be said with respect to legitimating independent administrative agencies.

My own view, however, is that it is both desirable and possible to strip the independent agencies of their adjudicative functions. There is a lot of evidence which suggests that independent administrative agencies behave for most purposes like executive branch agencies in the way in which they issue regulations and make policy.⁷¹ Even most scholars cannot remember from one end of the day to another which agencies are located in the executive branch and which are independent. But all that counts for naught on the question of whether the judicial functions of these agencies have substitute or substantial safeguards for judicial independence that remotely resemble those built in on the ground floor for Article III courts. The answer to that question has to be an unambiguous no. The FTC could still promulgate rules and initiate enforcement proceedings. And the NLRB could still oversee union recognition elections and investigate unfair labor practices. But the adjudication of its claims should be turned over to Article III (or even Article I) courts.

Two points—one clear and one less so—shape the discourse. The first involves the use of specialized administrative agencies with cer-

70 29 U.S.C. § 153(a) (Supp. I 1935). The number of members of the NLRB was increased to five by the Labor Management Relationship (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136.

71 See, e.g., Strauss, *supra* note 42, at 704–05.

tain well-defined subject matter areas—labor, securities, telecommunications. In one sense, this level of specialization is identical to that which is found with tax and bankruptcy court. But is that formal parallelism sufficient to acquit the independent agencies on this score? To that, the answer is surely no. The choice between Article I courts and independent agencies is not randomly made. Much depends on the perceived nature of the issue that is likely to arise within these two fora. Bankruptcy and taxation do raise their fair share of hot button issues, for example, but few of those issues arise in the day-to-day application of the law, which deals largely with technical matters on which there are few political differences. Not so with the other three areas, where deep political issues are built into the agency jurisdiction. The struggles between management and labor bear no documentation on the level of class conflict. The allocation of licenses under the FCC gives rise to extensive political debate over all sorts of hot button issues relating to program content, affirmative action, and diversity. Securities law often pits small investors against large corporations and asks fundamental questions about the viability of unregulated capital markets. The clear subject matter in these agencies tip off the President and Congress of the anticipated orientation of potential appointees on these matters. The appointments process is not subject to the kind of drag that arises with appointments to courts of general jurisdiction, where it is much more difficult to pigeon hole nominees to the President's personal satisfaction on a wide array of issues. The judge whose views you like on national security is the judge you fear on antitrust—yet the two distinct persona are bound at the hip in any court of general jurisdiction. Those connections are severed with respect to administrative agencies.

So, true to form, it is no accident that the appointive process takes on a different form. The Securities and Exchange Act makes explicit the political valence. Section 4(a) states:

There is hereby established a Securities and Exchange Commission (hereinafter referred to as the 'Commission') to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.⁷²

For its part, the NLRA calls for five-year terms for its members (who are not judges, of course), the Chairman of which is appointed by the

⁷² 15 U.S.C. § 78d(a) (2006).

President.⁷³ But it is for good reason that the three-two split is observed in its actions, given the deep political splits on substantive issues. The needed matching of board members has the unfortunate side effect of creating log jams at renewal, for the entire operation is an elaborate ritual of pairing up the appointees from both sides in package deals such that the Democrat will not get appointed unless his or her Republican is appointed as well. As the level of conflict increases, the appointment process effectively stalls. As of this writing the NLRB has had only two members, Wilma Liebman, Chairman, and Peter C. Schaumber, member, which is the minimum quorum by which it can do work. The compromise intensifies the level of partisanship to far greater heights than in the federal courts, where the recent spate of empirical evidence notes some modest level of political disagreement, which in routine cases may be less significant than meets the eye.⁷⁴

In this context, it makes little sense to overrule *Humphrey's Executor* and make these commissioners subject to the removal power of the President. That situation would be wholly intolerable given the partisan nature of the divisions over the judicial portions of their workload. The only argument is that, faced with this risk, a sensible Congress might jettison the scheme altogether. But that result would not happen so long as the President and Congress are controlled by the same party, as is the case today. So it would be a classic illustration of jumping out of the frying pan into the fire. The manifest risks of partisanship and intrigue are so evident that any serious constitutional inquiry should not immunize the independent agency model from scrutiny on the basis of the long passage of time. As urged earlier, the Article I court alternative is clearly preferable for the judicial functions of these agencies, whose wings should be clipped by the Supreme Court if necessary.

E. Delegations to the Executive Branch

This piece of the puzzle involves the delegations that Congress makes to the executive, knowing, of course, that within limits the President does possess the right to remove key officials at will. At this

⁷³ 29 U.S.C. § 153(a) (Supp. I 1935).

⁷⁴ See, e.g., LEE EPSTEIN ET AL., JUDICIAL BEHAVIOR: THEORETICAL AND QUANTITATIVE PERSPECTIVES (forthcoming). For an empirical review, see CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006). For a skeptical view on the appellate cleaves, see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009).

juncture, Congress faces the issue with which this paper began. What institutional structures should be introduced to offset the advantage that the President has with a fixed four year term? The doctrinal lens through which this problem is approached is the so-called “nondelegation” rule, which is a modern application of the Latin maxim *delegatus non potest delegare*: the delegatee is a person who is not allowed to delegate further. This maxim has its start in the private law and its power can be seen in connection with the usual situation in contract law, which is receptive to the assignment of rights but suspicious of the delegation of duties. In its simplest incarnation, delegation of a duty to pay carries with it a huge default risk that is not found in connection with the assignment of the right to collect. And with service obligations, the famous painter cannot delegate his duty to paint a portrait to his callow apprentice, unless he first obtains the consent of the other party. All of these rules are, at bottom, default rules so that contracts can be drafted to either expand or contract delegation. The cases in which these risks are ignored in explicit contracts are few and far between.

The public law context raises somewhat different issues on structural matters because in these cases the limitations should be regarded as impervious to political agreement.⁷⁵ That point dates back to Locke, who wrote:

[T]he *legislative cannot transfer the power of making laws* to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws and place it in other hands.⁷⁶

That attitude surely worked its way into our constitutional tradition, with its Lockean impulse to protect wherever possible the public at large from government intrigue. One corollary is that any agreement between the President and the Congress, even if unanimous, which would let the President do what he will under a statute that essentially allows him to rule by decree, is surely out of bounds. This is yet another application of the basic principle that freedom of contract among current holders of various public offices can never be al-

⁷⁵ There are clearly here shades of the structural application of the unconstitutional conditions doctrine. See *supra* note 15 and accompanying text; see also STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES 38–74 (5th ed. 2002) (surveying the nondelegation doctrine).

⁷⁶ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 81 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (emphases added).

lowed to undo the structural limitations that the Constitution imposes on the three branches of government.

This extreme case has never come up because Congress has its own institutional bailiwick to protect against the President, which makes it difficult to persuade it to grant him such power. At this point, the interpretive question is how to treat these political safeguards. On the one hand, it could be said that hard cases test the principle, and so long as government by presidential decree is within limits, the delegation doctrine has teeth. The opposite position asks, why introduce a doctrine that will have some teeth and then figure out how to allow the major delegations to the executive branch to take hold.

The fruit of this deliberation is less than ideal, for it yields the principle that the Congress can delegate to the executive branch what it wants, so long as there is some “intelligible principle” that governs the delegation.⁷⁷ That principle carries with it little weight in practice, so that delegations are routinely sustained today. But here again, the political economy story cannot be ignored, for the key question is why delegate key tasks to the executive agencies, where the President enjoys the removal power over subordinates, rather than to independent agencies, where he does not? The answer to that question comes, I believe, in a set of straightforward strategic choices. The independent agency, with its so-called institutional safeguards, will be used in those cases where *permanent* bodies are needed to implement complex policies. The Congress that creates these delegations needs to be sure that the President—not just the current occupant, but his successors—will not neutralize its program by hiring and firing his own people. The level of residual discretion thus invites Congress to hedge its bets. It knows that it cannot churn out the volume of work itself. It wants to take steps to see that the delegation does not give excessive power to the President, who could, under the guise of interpretation, undo the agency’s central mandates.

But the strategic calculus changes with respect to short-term delegations. The key exemplar on this point is *A.L.A. Schechter Poultry Corp. v. United States*,⁷⁸ which struck down a delegation of authority to the President to create codes of “fair competition” under the (ghastly) provisions of the National Industrial Recovery Act of 1933. Chief

77 For the recent statement on this point, see *Whitman v. American Trucking Associations*, 531 U.S. 457, 473 (2001) (rejecting the view that “an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power”).

78 295 U.S. 495 (1935).

Justice Hughes wrote a learned opinion, in which he professes immense difficulty in defining what is meant by “fair competition” under the Act.⁷⁹ And he was troubled in this effort because he knew well that the Federal Trade Commission received quasi-legislative and quasi-judicial powers to declare unlawful various acts of unfair competition, all of which were undefined. How does one keep one statute constitutional and not the other? This is a good question, to which Chief Justice Hughes’s decision in *Schechter* offers no acceptable answer. And the mystery deepens because Justice Cardozo rose up on his common law haunches to denounce a statutory scheme that tolerates “delegation running riot” to the President.⁸⁰

What on earth were they talking about? The initiatives of the National Industrial Recovery Act were not chump change:

In the course of its short life from August, 1933, to February, 1935, the Administration formulated and approved 546 codes and 185 supplemental codes filling 18 volumes and 13,000 pages; 685 amendments and modifications to these codes. It issued over 11,000 administrative orders interpreting, granting exemptions from, and establishing classifications under the provisions of individual codes⁸¹

This was no small time operation.

And where was Congress during all this? Happy as a clam. The cartel-du-jour model had swept the land, and that model is what the President implemented. The genius of the legislative provision was to prevent monopolies: “[t]hat such code or codes shall not permit monopolies or monopolistic practices.”⁸² So it looks like the free market is in action, until you read the entire Act. The codes are submitted by “one or more trade or industrial associations or groups.”⁸³ The bottom line: no to single monopolies, yes to cartels. And these cartels would be spread out across the United States, creating an extensive membership base that was the source of large levels of political support for the program. The effective restraint left to Congress was, moreover, as simple as it was effective. Moreover, the entire program was limited to a two-year period.⁸⁴ The length of operation was not ambiguous, so there is little risk of judicial nullification of the provision. Once the original term expired, or even before, Congress could have revisited the matter and extended the

⁷⁹ *Id.* at 531.

⁸⁰ *Id.* at 553 (Cardozo, J., concurring).

⁸¹ BREYER ET AL., *supra* note 75, at 46 (quoting LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW, CASES AND MATERIALS 52 (4th ed. 1976)).

⁸² National Industrial Recovery Act, ch. 90, § 3(a)(2), 48 Stat. 195, 196 (1933).

⁸³ *Id.* § 3(a).

⁸⁴ *Id.* § 2(c).

program if it so chose. Let there be divided power and the President will see his delegation shrink as the usual wall of suspicion rises. Indeed, the real tragedy of striking down this unholy situation on non-delegation grounds is that it invited the perpetuation of various bits of the program through other legislation, such as the Agricultural Marketing Agreement Act of 1937,⁸⁵ the Agricultural Adjustment Act of 1938,⁸⁶ and the National Labor Relations Act,⁸⁷ all of which have more structure.

The creation of permanent agencies inside the executive branch gives rise to other questions of legislative oversight. In this regard, it is no coincidence, in my view, that the first appearance of the legislative veto is in 1932, at the start of the New Deal revolution, only to expand in popularity hereafter.⁸⁸ These vetoes could be done by a single house of Congress or by both houses acting in concert. But one feature common to both systems was that the action in Congress did not meet the dual constitutional requirements of presentment and bicameralism.⁸⁹ The dual requirements were part of the general scheme that was intended to fortify one central tenet of limited government: its basic presumption against the passage of new legislation.

The legislative veto is, of course, a legislative device that allows either house of Congress, or even some fraction thereof, to override decisions in individual cases made within the bowels of the executive branch. It can only be introduced by general legislation, and is subject to repeal in the same fashion, so that it would be wrong to think of the process as one that either or both houses of Congress could adopt simply on their own motions. Wholly apart from the textual issues, it could easily be justified on the ground that it is yet another of the many adjustments to constitutional structure that make sense in light of the huge change in scope and scale of federal operations. Put otherwise, once expansion of federal power gets larger, other ad-

⁸⁵ Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246.

⁸⁶ Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31.

⁸⁷ National Labor Relations Act, 29 U.S.C. § 158(a)(5) (2006).

⁸⁸ See James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977) ("Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940–49, nineteen statutes; between 1950–59, thirty-four statutes; and from 1960–69, forty-nine. From the year 1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.").

⁸⁹ See U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . .").

justments have to be made as well. In response, it can be argued that the constitutional structure is intended to guard against just these alterations of the process through legislative means. The President gets a veto of legislation from the Congress. Congress does not get to veto the executive actions of the President and his officers.

The crosscurrents on this issue first came before the Supreme Court only forty years after the practice was first instituted, which of course tilts the balance implicitly in favor of its constitutionality. Nonetheless, the watershed case of *INS v. Chadha*⁹⁰ addressed the constitutionality of the Immigration and Nationality Act, insofar as it provided that if either the Senate or the House announced that it did not support the suspension of the deportation of an alien by the Attorney General, the Attorney General was bound to deport the alien or to otherwise arrange for his voluntary departure. The House of Representatives overturned the Attorney General's decision to suspend Chadha's deportation, rejecting in effect the administrative determination of hardship. The issue before the Court was whether the decision comported with the rigid system of separation of powers. The Court concluded that the decision did not so comport because it did not take the presentation and bicameralism requirements seriously.

The first point to note about this odd statute is that it was only a one-way ratchet. The basic legislation did *not* allow either house of Congress to suspend any deportation that had been ordered the Attorney General. It only allowed them to overturn decisions that suspended deportation. The usual instinct in actions that have real consequences to individuals is to give them, not the state, all the procedural advantages; but this was not a case where the deported alien could make a last-ditch plea. So the issue is: why do the procedural rules cut in the opposite direction? The explanation must run along the following lines. The individual who is deported has every incentive to fight the entire matter in the courts. If there is a sweetheart deal with Attorney General, however, then there is no one with standing to challenge it. The matter, therefore, comes back to Congress, which faces constant protectionist pressures to keep immigration down to limit the competition with domestic workers, which is built into the fabric of all our H1B visas. So how then to classify the peculiar arrangements? It is surely not legislation, as it only applies to a single individual. Unlike private member bills, it does not go through both houses, and is in any event the review of a judicial deci-

90 462 U.S. 919 (1983).

sion. Yet, by the same token, it is surely not any form of adjudication since the action is valid without any hearing, a report or a statement of reasons.⁹¹ And it does not look as though it is an exercise of executive power. Ultimately, the Supreme Court struck the statute down on the ground that it did not comply with the minimum requirements of legislation, namely presentment and bicameralism.⁹² If anything, the statute looks closest to a Bill of Attainder, which the Constitution prohibits the states from enacting.⁹³ But it hardly matters. There are thousands of these veto provisions that are actively used today. *Chadha*, it appears, has not made a dent in the old system whose formal requirements are often too stiff. And at this point, the old practices continue to hold sway.

III. CONCLUSION

In sum, any analysis of the unitary executive cannot take place in a constitutional void. Within the early constitutional framework of limited federal powers, the issue is not all that acute because there are few issues with which the Congress cannot deal in advance. But as the systems become larger and more ambitious, the entrenched position of the President puts Congress in a more difficult position, to the extent that its (current) majority perceives long term conflicts with the executive branch. As I have argued elsewhere, the rise of the independent administrative agency is yet another tile in the complex mosaic that ushers in the expansion of government power through a relaxation of the federalism limitations under the Commerce Clause and the property and economic liberties protections under the Bill of Rights.⁹⁴ These lockstep maneuvers make sense if divided government is thought to be the problem rather than the solution. But in its own way, a strong defense of the President's removal power is that it increases the costs of legislative/executive cooperation, which, on balance, leads to smaller government. This, in turn, is a blessing whose benefits are sorely missing today. It is possible to lament the

91 *Cf. id.* at 960–67 (Powell, J., concurring) (arguing that the legislative veto was akin to judicial action).

92 *See* U.S. CONST. art. I, § 7, cl. 2, 3 (mandating that every bill that has passed both houses of Congress must be presented to the President of the United States, and that if the President disapproves of an order, resolution, or vote, the Senate and House or Representatives must repass it by two-thirds of the vote).

93 U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”).

94 For the arguments, see Epstein, *supra* note 42, at 496–98.

current path of development. But so long as we live in an era of big government, it is not possible to change it.