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From Administrative State to Constitutional Government

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Abstract

The administrative state is an assault on constitutional principles—government by consent, the separation of powers, and the rights of individuals—that liberals and conservatives hold dear. The key to reform is that it be grounded in a proper understanding of these principles, not in the hope of immediate short-term gain or narrow self-interest. If we begin from constitutional principles and can communicate those principles and their relevance to the public in a clear manner, the reforms envisioned in this report are not too far from our grasp. It is high time that Americans work together to forge an alternative to the administrative state so that we preserve our constitutional principles for future generations.

Over the past 100 years, our government has been transformed from a limited, constitutional, federal republic to a centralized administrative state that for the most part exists outside the structure of the Constitution and wields nearly unlimited power. This administrative state has been constructed as a result of a massive expansion of the national government's power.

When the Founders created our Constitution, they entrusted only limited powers to the national government and specifically enumerated those powers in the Constitution itself. A government that only had to carry out a limited number of functions could do so through the institutions and procedures established by the Constitution.

But as the national government expanded and began to focus more and more on every aspect of citizens' lives, the need for a new kind of government—one focused on regulating the numerous activities of citizens rather than on protecting their individual rights—became apparent. In the United States, this new form of government is the administrative state. In *Democracy in America*, Alexis de Tocqueville warned that under such a government, citizens would become "nothing more than a herd of timid and industrious animals, of which the government is the shepherd."[1]

As the modern administrative state has grown and metastasized over the past decades, it has taken many forms, to the point of becoming the primary method of politics and policymaking. The myriad agencies and departments that make up this administrative state operate as a "fourth branch" of government that typically combines the powers of the other three and makes policy with little regard for the rights and views of citizens. In terms of actual policy, most of the action is located in administrative agencies and departments, not in the Congress and the President as is commonly thought. Unelected bureaucrats—not elected representatives—are running the show.

One of the greatest long-term challenges facing the United States is the restoration of limited constitutional government. Central to that objective, and an essential aspect of changing America's course, is the dismantling of the administrative state that so threatens our self-governing republic.[2]

The Constitution vs. the Administrative State

Central to the idea of American constitutionalism are the concepts of representation, the rule of law, and the separation of powers. The administrative state does damage to all

of these principles. A few examples demonstrate how these principles are violated by the administrative state.

We often think that the laws of this country are passed by Congress. Since Members of Congress are elected by the people, we assume that we have therefore indirectly consented to the laws that we must follow. The reality is much different. Most federal law is created by the agencies and departments that make up the national bureaucracy, not by Congress. Congress passes laws delegating its legislative power to these agencies and departments, and they in turn develop the laws with which we must comply.

When Nancy Pelosi famously declared that we would have to pass the Patient Protection and Affordable Care Act (popularly known as "Obamacare") so that we could find out what is in it, she was not referring to the length of the bill. Rather, she was referring to the fact that most of the laws—such as the infamous Health and Human Services (HHS) requirement that all insurance providers cover contraception, abortifacients, and sterilization—would be made by HHS, not found in the statute that Congress was passing.

Similarly, in March 2011, the Environmental Protection Agency (EPA) announced that the Clean Air Act suddenly allowed it to regulate mercury emissions from coal plants. The EPA announced that the rule would cost $10.9 billion annually over the next 10 years so that older plants could be retrofitted for the new technology. In announcing the rule, the EPA acknowledged that many coal plants would have to be shut down, and several power companies testified that the rule would result in rolling blackouts and unreliable energy supply.[3]

Why is an agency run by unelected officials making such massive decisions affecting the U.S. economy? And why is it doing this under a mandate, created decades ago, that was designed to deal with a completely different problem? This is fundamentally contrary to the idea of republican government and the principle that all laws must be passed by our elected representatives.

BUREAUCRATS WRITE THE LAWS AND, BECAUSE THEY EXECUTE THEM, ARE ALSO ABLE TO EXEMPT POLITICALLY POWERFUL GROUPS AND INDUSTRIES FROM THOSE SAME LAWS. THIS VIOLATES THE IDEA THAT WE ARE ALL TO BE TREATED EQUALLY UNDER THE LAW.

The administrative state also undermines the rule of law. Bureaucrats regularly make exemptions to the regulations that they create. By its own recent count in January 2012, HHS has granted over 1,700 waivers from its own regulations under Obamacare.[4] Bureaucrats therefore write the laws and, because they execute them, are also able to exempt politically powerful groups and industries from those same laws. This violates the idea that we are all to be treated equally under the law, rich and poor, powerful and weak alike.

Finally, the administrative state violates the principle of the separation of powers by breaking down the divisions between the constitutional branches of government. Power is transferred from Congress to agencies and departments, which are then influenced by all three branches of government but not directly accountable to any, and the effect of checks and balances is reversed. All of the branches work together to control the unwieldy administrative apparatus that often combines all three powers of government—legislative, executive, and judicial.

The National Labor Relations Board is a perfect example of this combination of powers. In its infamous decision to sue to block airline manufacturer Boeing from moving some of its facilities to South Carolina, which is a "right to work" state, the NLRB acted as lawmaker, investigator, prosecutor, judge, jury, and executioner.

This is clear from the facts of the decision. The machinists union notified the NLRB that Boeing was moving some of its production to South Carolina from Washington State, and this prompted the NLRB's lawsuit.

In specific cases where an employee alleges that an employer is engaging in "unfair labor practices" (a vague phrase that is defined, of course, by NLRB rules), the employee's allegation is typically resolved in a hearing before an NLRB

1. Alexis de Tocqueville, *Democracy in America* (Chicago: University of Chicago Press, 2000), Vol. 2, ch. 6, p. 663.
2. Matthew Spalding, *Changing America's Course: What's at Stake in 2012* (Washington: The Heritage Foundation, 2012).
3. Jon Hurdle, "Rolling Blackouts to Come from EPA Rule Schedule, Claim Power Companies," AOL Energy, http://energy.aol.com/2011/12/01/rolling-blackouts-to-come-from-epa-rule-schedule-claim-power-co/ (accessed December 1, 2011).
4. Center for Consumer Information and Insurance Oversight, "Annual Limits Policy: Protecting Consumers, Maintaining Options, and Building a Bridge to 2014," http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (accessed July 9, 2012).

administrative law judge. These administrative law judges issue decisions on behalf of the agency. Employers who receive an adverse decision by the NLRB's administrative law judge can appeal to...the NLRB.[5] The NLRB itself decides several hundred cases per year, and only about 65 of those cases are appealed to an independent "Article III" court. While the circuit courts are called upon to review the NRLB's orders, the agency boasts on its website that "The majority [of cases]—nearly 80%—are decided in the Board's favor."[6]

The NLRB, in short, makes rules governing employer–labor relations, investigates violations of the rules that it issues, decides particular cases involving employers and employees, and enforces the decisions that it orders. This combination of legislative, executive, and judicial power inevitably causes objectionable bureaucratic decisions. When we create institutions that violate our basic constitutional principles, we lay the groundwork for tyrannical decisions. The problem, in other words, is not necessarily the specific people running the NLRB. The agency was set up to act in a dysfunctional manner.

In sum, the administrative state centralizes power in Washington and then consolidates that power in the hands of agencies and departments that violate republican government, the rule of law, and the separation of powers. As a result, citizens find themselves at the mercy of government agencies and departments over which they have no control. With the removal of these controls, bureaucrats often overreach and cause profound damage with little accountability or public awareness.

Bureaucrats Gone Wild

Examples of bureaucrats gone wild abound. For example, the U.S. Fish and Wildlife Service (FWS), in pursuance of the lawmaking powers delegated to it by the Endangered Species Act (ESA), is authorized to list a species as either "threatened" or "endangered." The agency also designates "critical habitat" for all listed species. Anyone affecting the habitat of a threatened or endangered species in any way is subject to substantial fines and even criminal charges.

Once a species is listed, in other words, FWS bureaucrats assume control over the use of all private property in the area where the threatened species lives. In New Jersey, a 77-year-old woman "was prohibited from building a home on land she had bought for her retirement because the FWS ruled that there was a federally protected plan species 'within five miles of the proposed project site.'"[7]

Under the broad powers delegated to it by the ESA, the FWS has delayed the building of schools and hospitals, dictated to landowners how their land is to be used, and generally prohibited development when any listed species may be affected in any way. For example, after "negotiations" between the FWS and biologist consultants hired by the Napa Valley Unified School District in California, the district was required to purchase 317 acres of vacant open space at a price of $4.6 million to mitigate risks to the California Red-Legged Frog.[8]

To save the same frog, the city of San Francisco proposed a series of projects to preserve a public golf course (the Sharp Park Golf Course) that would cost from $6 million to $10 million by relocating Red-Legged Frog egg masses to safer areas under the supervision of FWS authorities. However, environmental groups are using the ESA to sue the city of San Francisco, saying that these relocation measures are insufficient and that nothing short of shutting down the course is acceptable.[9] The California Red-Legged Frog and the California Tiger Salamander have caused similar vexation to the Northern California wine industry.[10]

In each of these cases, the rights of citizens were threatened by administrative agencies that have been given the power to make laws; investigate, prosecute, and enforce laws; and even in many cases to judge violations of their laws. In fact, most of the "laws" of this country are made, executed, and applied by administrative agencies and departments. They operate under the radar, largely insulated from the control of the people.

5. U.S. National Labor Relations Board, "Decide Cases," https://www.nlrb.gov/what-we-do/decide-cases (accessed December 1, 2011).
6. U.S. National Labor Relations Board, "Enforce Orders," https://www.nlrb.gov/what-we-do/enforce-orders (accessed December 1, 2011).
7. James Bovard, "Endangered: Property Rights," June 1998, http://www.fff.org/freedom/0698d.asp (accessed March 10, 2011).
8. Kerana Todorov, "Red-Legged Frog Concerns Should Have No Impact on AmCan High Construction," *Napa Valley Register,* August 3, 2007, http://napavalleyregister.com/news/local/article_e7cd828e-4bcd-594b-9317-f54286a6f476.html (accessed March 10, 2011).
9. Kelly Zito, "Sharp Park Golf Course Sued over Red-Legged Frog," *San Francisco Chronicle,* March 3, 2011, http://articles.sfgate.com/2011-03-03/28648661_1_wildlife-habitat-endangered-species-act-california-red-legged-frogs (accessed March 10, 2011).
10. Paul P. "Skip" Spaulding III, "Species Issues Tested in the Vineyards," *North Bay Business Journal,* October 20, 2008, http://www.northbaybusinessjournal.com/28686/guest-contributor-species-issues-tested-in-the-vineyards (accessed March 10, 2011).

They often combine the powers of government, and their personnel are primarily unelected. This is the predominant feature of our new form of government, the administrative state, and it's where the action is.

WHEN OUR ELECTED REPRESENTATIVES FAIL TO ENACT POLICIES BECAUSE OF POPULAR OPPOSITION, THEY KNOW THAT THE INSTITUTIONS OF THE ADMINISTRATIVE STATE CAN CARRY THESE VERY POLICIES OUT WITHOUT RESISTANCE, USING THE POWERS DELEGATED TO THEM BY CONGRESS.

When our elected representatives fail to enact policies because of popular opposition, they know that the institutions of the administrative state can carry these very policies out without resistance, using the powers delegated to them by Congress. After legislation to enact cap-and-trade climate change policies failed in the U.S. Congress in 2009, undaunted progressives declared that Congress did not need to act for cap-and-trade to happen: We had already given the EPA power to enact cap-and-trade by administrative fiat. The day after the Democrats lost the majority in the House of Representatives in the 2010 midterm congressional elections, the *Huffington Post* published a piece entitled "Obama Can Pursue Ambitious Agenda Without Congress's Help,"[11] suggesting that if Congress were reluctant to pass cap-and-trade, the EPA should do so on its own.

Elections do not matter very much if agencies can make policy without the support of our elected representatives. Yet today, whether or not Congress makes law, administrative agencies and departments already have the power to make new rules, rendering the concept of representation nugatory.

Structure of This Report

In order to begin the restoration of constitutional government, we must first understand what the administrative state is and why it is profoundly at odds with the principles of the Constitution. However, understanding the problem of the administrative state is not sufficient. We must also devise an effective strategy, one that is feasible and acceptable to the American people, to begin this process of restoration.

This report offers both an explanation of the problem and a guide to thinking about the solution.

- Part 1 explains what the term "administrative state" means. There is a lot of confusion surrounding the administrative state, so Part 1 provides a straightforward explanation of what exactly it is and also explains the process by which it was created in America.

- Part 2 explains why the administrative state is a profoundly unconstitutional form of government. It highlights the four major constitutional problems with the administrative state: the combination of powers, the delegation of legislative power, the erosion of government by consent, and an adjudicative process unmoored from the rule of law.

- Part 3 lays out the alternative: regulation that is accountable and that respects the natural rights of citizens to liberty and property. The alternative is not a laissez-faire economic policy. The American Founders accepted the need and legitimacy of regulation. But they made sure that it was consistent with the principles and the Constitution that they worked so hard to establish. Our efforts to reform the administrative state should be in the same spirit.

- Part 4 suggests some practical steps that citizens and elected representatives can take to restore constitutional government and tackle the profound challenge posed by the administrative state.

11. Dan Froomkin, "Obama Can Pass Ambitious Agenda Without Congress's Help," *Huffington Post,* November 4, 2010, http://www.huffingtonpost.com/2010/11/03/obama-can-pursue-busy-age_n_778583.html (accessed March 15, 2011).

Part 1: What Is the Administrative State?

The term "administrative state" or "regulatory state" is used frequently but often inaccurately. To what does it actually refer? Broadly speaking, the term "administrative state" describes our contemporary situation, in which the authority to make public policy is unlimited, centralized, and delegated to unelected bureaucrats.

There are different types of agencies and departments that make up the administrative state.

- Some of them are located within executive branch departments and are often called "executive agencies." The Occupational Safety and Health Administration, for example, is located in the Department of Labor, and the Fish and Wildlife Service is located in the Department of the Interior.

- A few, such as the Environmental Protection Agency, are deemed executive agencies but are not in fact located in any of the 15 executive departments.

- Other agencies are not understood to be in the executive branch at all and are called "independent regulatory commissions." Examples include the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC).

- In certain cases, entire Cabinet-level departments function as administrative agencies. The Department of Health and Human Services and the Department of Education come to mind.

Determining the exact total number of these agencies and departments is a monumentally difficult task, but there are several dozens of them, each with massive power over a particular aspect of national policy.

However, the *problem* of the administrative state is straightforward. Whether the regulatory agencies are "executive agencies," "executive departments," "federal departments," or "independent regulatory commissions" is irrelevant. In whatever form they may take, the myriad agencies and departments that make up this administrative state operate as a "fourth branch" of government that typically combines the powers of the other three and makes policy with little regard for the rights and opinions of citizens.

BEYOND THE DRAIN ON THE ECONOMY IMPOSED BY THESE REGULATIONS, THE AGENCIES AND DEPARTMENTS THAT ISSUE THEM OPERATE LARGELY OUTSIDE OF THE FRAMEWORK OF GOVERNMENT ENVISAGED BY THE CONSTITUTION.

Every year, these departments and agencies issue a torrent of costly and entangling regulations that have far-reaching repercussions on the economy. As The Heritage Foundation's "Red Tape Rising" report on regulation notes:

> During the first three years of the Obama Administration, 106 new major federal regulations added more than $46 billion per year in new costs for Americans.... Hundreds more regulations are winding through the rulemaking pipeline as a consequence of the Dodd–Frank financial-regulation law, the Patient Protection and Affordable Care Act, and the Environmental Protection Agency's global warming crusade, threatening to further weaken an anemic economy and job creation.[12]

Beyond the drain on the economy imposed by these regulations, the agencies and departments that issue them operate largely outside of the framework of government envisaged by the Constitution. Although ostensibly part of "the Administration," many of these agencies are in fact not subject to the exclusive control of the President. Rather, they are supervised by congressional subcommittees, upper-level executive appointees, and courts.

In short, there are four basic features that define the administrative state, each one of which is profoundly at odds with the Founders' constitutionalism. (These features are explained in depth in Part 2.) It should be noted that not *every* agency and department that makes up the administrative state combines all four of the following features. Some agencies and departments, for instance, do not have the power of adjudication. But these four problems are common enough that they are prevalent in the structure of the administrative state.

1. **Combination of the three traditional functions of government.**

12. James L. Gattuso and Diane Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, p. 1, http://www.heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-the-three-year-mark.

Agencies and departments often possess legislative power in conjunction with executive and judicial powers. This violates the basic principle of the separation of powers that is central to our Constitution.

2. **Delegation of legislative power** to administrative agencies and departments, which possess the authority to makes "rules" that are in fact indistinguishable from laws. Agencies and departments pass rules that are legally binding on the public, and citizens can be fined and imprisoned for violating these rules. This violates a basic principle of the Constitution, which requires that legislative power be possessed only by elected representatives in Congress.

3. **Staffing of these agencies and departments with "impartial experts"** who are not chosen by the people. While many senior personnel in agencies and departments are appointed by elected officials, most personnel are selected through a merit system that is not based on election by the people.

4. **A judicial process that prioritizes efficiency and social justice** rather than the rights of individual citizens. Agency adjudications are not required to adopt due process or other judicial procedures that are in place to ensure that individual rights are protected.

What the Administrative State Is Not

While it is essential to have an accurate definition of what the administrative state *is*, it is just as important to understand what the administrative state is *not*.

1. **The administrative state is not synonymous with the welfare state.** The idea of welfare benefits provided by the national government through entitlement programs is often what we think of when we use the term "administrative state." But welfare benefits as entitlements are substantive policy *outcomes*, whereas "administrative state" refers to the *form* of government institutions and the *process* by which public policy is made. Any attempt to curtail or cut back the administrative state does not necessarily require elimination of government benefits or programs, or vice versa.

2. **The administrative state does not simply refer to the proliferation of administrative agencies.** Administrative agencies such as the Pension Bureau, the General Land Office, and the U.S. Customs Service have been around since the beginning of the republic and, until the Progressive Era, largely refrained from exercising powers that are typical of modern administrative agencies. Administration in the original sense referred to purely executive actions that required little to no discretion and simply carried out clear standards in legislation and judicial decisions.

In other words, administration has always been a necessary element in governments, but it used to refer to actions such as investigation, prosecution, and enforcement rather than lawmaking and adjudication.[13] Again, just as curtailing the administrative state does not *necessarily* entail elimination of the welfare state, so does it not necessarily entail the elimination of administrative agencies. Rather, it means that those agencies would be restricted to performing their traditional executive functions.

3. **The administrative state does not necessarily mean the expansion of executive power.** Many believe that the expansion of administrative agencies has resulted in the expansion of executive power in America. This is inaccurate. The Progressives, who created the administrative state in the early 20th century, understood this well. James Landis, an important theorist of the administrative state during the New Deal, emphasized that:

> [T]he resort to the administrative process is not, as some suppose, simply an extension of executive power. Confused observers have sought to liken this development to a pervasive use of executive power.... In the grant to [an agency] of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole.[14]

The famous Progressive author Herbert Croly concurred: "a sharp distinction must be drawn

13. Administration in the traditional sense would also include "public service" actions that are noncoercive but public in nature, such as the building of roads or naval fleets (in accordance with laws passed by the legislature) and the like.

14. James Landis, *The Administrative Process* (New Haven: Yale University Press, 1938), p. 15.

between the administration and the executive" powers.[15] Modern administrative agencies are not solely executive in nature; they were designed to consolidate and expand all power: legislative, executive, and judicial. They are not hierarchically accountable to the President, as many personnel in agencies are outside of immediate presidential influence. Thus, it is highly inaccurate to say that the administrative state has entailed an expansion of executive power in America.

Creation and Growth of the Administrative State

The administrative state was not created all at once in America. Its roots go back to the late 19th century, when changes in the American economy spurred by the Industrial Revolution created a political crisis.

Starting in the 1870s, farmers in Western and Midwestern states began to clamor for government intervention to control railroads, which farmers used to ship crops to markets; banks, which loaned money to farmers for land and equipment; and other powerful economic entities. This "Granger" movement took hold in many states, and railroad commissions were created at the state level to dictate rates at which railroads could haul goods to markets. In response to these concerns, the first federal administrative agency—the Interstate Commerce Commission (ICC)—was created in 1887.

But the Grangers were wary of entrusting bureaucrats in centralized agencies with too much power. They were fearful of bureaucracy as much as they were fearful of powerful economic interests. Thus, the ICC's power was carefully limited. In the same spirit, the Sherman Anti-Trust Act of 1890, which was intended to break up powerful economic combinations called "trusts," did not create a federal bureaucracy.

From 1887–1900, the federal government tried to regulate the new industrial economy without enacting full-scale bureaucracies, but the precedent of the ICC would be used by a new group of reformers, called the Progressives, to create the first batch of federal programs and agencies that would become the administrative state.

THE PRECEDENT OF THE INTERSTATE COMMERCE COMMISSION WOULD BE USED BY A NEW GROUP OF REFORMERS, CALLED THE PROGRESSIVES, TO CREATE THE FIRST BATCH OF FEDERAL PROGRAMS AND AGENCIES THAT WOULD BECOME THE ADMINISTRATIVE STATE.

The Progressives were led by reformers such as Theodore Roosevelt; Woodrow Wilson; Herbert Croly, co-founder of *The New Republic* and author of *The Promise of American Life*; and Frank Goodnow, a prominent professor of public administration who taught at Columbia and was president of Johns Hopkins University.[16] Like the Grangers, these Progressives aimed to expand national power, but their ends were very different from those of the Grangers. Many of them were educated in 19th century German philosophy, particularly Hegelian idealism. All of them were heavily influenced by this new philosophy of government and sought to implement that new philosophy in America.

In a nutshell, these American Progressives applied the political philosophy of Hegelian idealism to mean the following:

- Individuals do not possess natural rights; rights and liberty are granted by government.
- The purpose of rights is not to promote the pursuit of individual happiness, but to allow individuals to dedicate themselves to the collective good of the whole society.
- For government to assist in achieving this dedication to the collective good, it had to be centralized at the national level, expanded dramatically, and involved in regulating most (if not all) of the economic and social decisions made by citizens.
- In order to administer this dramatically expanded government, federalism, limited government, and the separation of powers had

15. Herbert Croly, *Progressive Democracy* (New York: Macmillan, 1914), p. 354.
16. For a helpful summary and overview of these tenets of Progressivism written by a sympathetic Progressive during the Progressive era, see Charles Merriam, *A History of American Political Theories* (New York: Macmillan, 1903), pp. 305–333. For a more contemporary explanation of the key tenets of Progressivism, see Thomas G. West and William A. Schambra, "The Progressive Movement and the Transformation of American Politics," Heritage Foundation *First Principles Series* Report No. 12, July 18, 2007, http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics. For a discussion of the role of public administration and its relationship to public opinion, see Woodrow Wilson, "The Study of Administration," *Political Science Quarterly,* Vol. 2 (1887), pp. 207–209.

to be scrapped in favor of rule by enlightened, intelligent experts located in administrative agencies.

These Progressive reformers seized upon the public's desire for regulation and enacted laws creating new bureaucracies and strengthening the ICC. In 1906, Theodore Roosevelt used his "bully pulpit" to force Congress to pass the Hepburn Act, which dramatically expanded the ICC's power to set railroad rates and regulate the railroads.

After Woodrow Wilson's important victory in the 1912 presidential election, the wave of Progressive reform became a tsunami. The Federal Reserve Act, creating the Federal Reserve System, was passed late in 1913, and the Clayton Anti-Trust Act was passed in 1914, strengthening the antitrust powers held by the Federal Trade Commission, which had been created that same year. The FTC was empowered to eliminate "unfair competition," an open-ended phrase defined, of course, by the FTC commissioners. These commissioners, furthermore, would be appointed by the President upon confirmation by the Senate, but they could not be removed by him except in extreme cases of wrongdoing or incompetence. The same was true of the commissioners of the ICC.

Other major bureaucracies were created during the Progressive Era as well. In addition to the ICC, the FTC, and the Federal Reserve, the Food and Drug Administration was created in 1906 by the Pure Food and Drug Act, and the Federal Radio Commission (precursor to the Federal Communications Commission) and Federal Power Commission were created in 1927 and 1930, respectively.

The first wave of the creation of the administrative state established new and unprecedented principles about how government should work. These agencies had broad delegations of authority that gave them the power to make law, not simply execute it. The Federal Communications Act of 1934, for example, created the Federal Communications Commission and directed it to grant broadcast licenses to applicants "if public convenience, interest, or necessity will be served thereby."[17] Additionally, the heads of these agencies would not be accountable to the President, which meant that they existed as a "fourth branch" of government, not directly accountable to any of the three constitutional branches.

This new administrative state was expanded in two later periods in American history: the New Deal of the 1930s and the regulatory explosion of the 1960s and 1970s. In the New Deal, the administrative state created by the Progressives was expanded massively. Huge new agencies such as the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission were created during Franklin Roosevelt's presidency. The Great Society went even further, establishing agencies with broad authority to regulate the environment (the Environmental Protection Agency); consumer products (the Consumer Product Safety Commission); highway safety (the National Highway Traffic Safety Administration); and workplace safety (the Occupational Safety and Health Administration).

In addition, although the Great Society is associated with Lyndon Johnson, Richard Nixon also contributed significantly to the expansion of government and bureaucracy during his tenure in office (1969–1974). President Nixon instituted wage and price controls in 1971 and 1973, showing that he was no believer in limited government or economic freedom. He also supported the Clean Air Act and created the Environmental Protection Agency as well as the Occupational Safety and Health Administration. With the creation of EPA and OSHA under his watch, Nixon ranks as one of the greatest expanders of bureaucracy in American history.

THIS NEW ADMINISTRATIVE STATE WAS EXPANDED IN TWO LATER PERIODS IN AMERICAN HISTORY: THE NEW DEAL OF THE 1930S AND THE GREAT SOCIETY OF THE 1960S AND 1970S.

As this overview of the historical evolution of the administrative state illustrates, these efforts to expand the administrative state were, ironically, promoted by both political parties—Democrats and Republicans alike. Theodore Roosevelt, Herbert Hoover, and Richard Nixon were just as instrumental in creating administrative agencies and programs as Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson were.

In these second and third waves, the administrative state had finally arrived, but it was during the 1960s and 1970s that changes occurred that significantly altered the administrative state.

First, rather than delegating powers to "independent regulatory commissions" such as the SEC and FCC,

17. 47 U.S.C. § 307 (2000) (first enacted in 1934).

Congress began to create "executive agencies" such as the Environmental Protection Agency. Independent regulatory commissions, the hallmark of the New Deal, are headed by multiple commissioners who are not removable from office by the President. They were deliberately designed to be exempt not only from presidential control, but also from judicial review.

Executive agencies, by contrast, are usually headed by a single administrator and are normally housed in one of the executive departments. Unlike heads of independent regulatory commissions, the heads of these executive agencies are typically removable by the President. For example, the Occupational Safety and Health Administration, created in 1970, is housed inside the Department of Labor.

However, it is important to realize that both independent regulatory commissions *and* executive agencies create the same constitutional problems. For one thing, the vast majority of the personnel in both types of agencies are protected by civil service laws, which means that the President does not appoint them to office. As of 2009, of the 2.7 million civilian (non-military) civil servants employed by the federal government, only 2,500 were political appointees.[18]

The career bureaucrats in these agencies are very difficult to fire. One recent American politics textbook notes that "fewer than one-tenth of 1 percent of federal employees have been fired for incompetence" in recent years.[19] Furthermore, even the heads of departments, appointed and removable by the President, do not have complete control of the executive agencies such as OSHA. Therefore, the extent of the President's control of these agencies is limited.

Second, in the 1960s and 1970s, Congress took a much more skeptical view of agencies and subjected their decisions to much stricter judicial review. Simultaneously, judges began to develop legal doctrines that required agencies to follow extensive procedures, to justify their decisions before courts, and to allow interested parties to challenge agency decisions in court.

The result of these two major changes was to transform this constellation of regulatory agencies from a "headless fourth branch" of government to a fourth branch that is pulled and tugged in various directions by Congress, the courts, and the President at the same time. This did not increase the accountability of the administrative state. Rather, it merely created more confusion about which branch of government was responsible for agency decisions.

IT IS IMPORTANT TO REALIZE THAT BOTH INDEPENDENT REGULATORY COMMISSIONS *AND* EXECUTIVE AGENCIES CREATE THE SAME CONSTITUTIONAL PROBLEMS.

The "Professional" Bureaucracy

At the same time that the administrative state was being built, reforms were underway to ensure that these new bureaucracies would be "professional." According to the theory of the Progressives, bureaucracies would have to be staffed by people who were nonpartisan and not susceptible to the pressures of public opinion. Their work would be scientific, not political, and this meant that elected officials should not be able to appoint or remove them from office. The old way of staffing administrative agencies by appointment by elected officials, which led to the patronage system of the 19th century, would have to give way to a new model: the civil service system.

The Pendleton Act, passed in 1883, marked the beginning of the civil service. President James Garfield, elected in 1880, was assassinated by Charles Guiteau, who had sought a patronage appointment but was spurned by the President. The public horror at Garfield's assassination by a patronage-seeker led to attacks on the patronage system. The Pendleton Act created the modern system of competitive examinations for federal office. At first, only 10 percent of the federal workforce was covered under the Pendleton Act, but the President was given power to increase that ratio by executive order. Theodore Roosevelt extended the civil service program to cover over 60 percent of the federal workforce; today, the percentage of federal employees who are not covered is less than 0.001 percent.

What this means is that the overwhelming majority of the decision makers in the administrative state are neither elected by the people nor directly responsible to someone who is elected by the people. They are, literally, unelected bureaucrats.

When agencies run amok, the public is often confused about how to remedy the problem because the agencies lack accountability. They

18. Roger H. Davidson, Walter J. Oleszek, and Frances E. Lee, *Congress and Its Members,* 12th ed. (Washington: CQ Press, 2009), p. 343.

19. Barbara A. Bardes, Mack C. Shelley II, and Steffen W. Schmidt, *American Government and Politics Today: The Essentials,* 16th ed. (Boston, Mass: Cengage, 2011), p. 420.

cannot be voted out of office, and since the President does not have total control over agencies, the President cannot be held solely accountable for their actions. The basic principle of government by consent, which declares that the people should be governed by their elected representatives, was abandoned for the sake of having a "nonpartisan" bureaucracy.

The administrative state has been established for over a century, and its powers have been gradually expanded in new waves of reform. Today, as a result of the vision of those first Progressives in the early 20th century, most of the laws are made and carried out not by Congress and the President, but by federal agencies and departments. These institutions of the administrative state have been steadily removed from the oversight and accountability of the public at major cost to our constitutional principles.

Part 2: The Problem of the Administrative State

We have seen how the administrative state was established a century ago and gradually expanded into the leviathan that rules us today. The first step in reclaiming our constitutional principles and putting citizens back in control of their government is to survey the constitutional damage.

How, exactly, does the administrative state do harm to our basic principles? There are four major constitutional problems.

- The administrative state combines the powers of government in the hands of the same officials in violation of the separation of powers principle.
- It is based on unconstitutional delegations of legislative power from Congress to bureaucrats and administrators.
- It violates the principle of republican government, which requires that power—especially legislative power—be derived from the consent of the governed, expressed directly or indirectly through elections.
- The administrative process it follows to adjudicate disputes is fundamentally opposed to the protections offered by the rule of law in the traditional judicial process.

All four of these constitutional issues are alarming, but when they are considered together, it becomes apparent that the administrative state is nothing short of a transformation of the American regime from a republic to a bureaucracy.

1. The Combination of Powers: "The Very Definition of Tyranny"

Many modern administrative agencies clearly violate the Constitution's principle of separation of powers by combining legislative, executive, and judicial power in the same hands. James Madison explains in *Federalist* No. 47 that "the combination of all powers legislative, executive, and judiciary in the same hands...may justly be pronounced the very definition of tyranny."[20]

In Madison's view, the very act of combining all powers of government in the same hands is tyrannical, regardless of whether the official exercising these powers is benevolent. This is because the temptation to abuse that power will always be too great a temptation for human nature to withstand: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[21] Men, alas, are not angels.

During the Progressive Era, in the early 20th century, the principle of the separation of powers was openly criticized. This led to the consolidation of all of the government's powers in administrative agencies. Progressive reformers during the early 20th century viewed the separation of powers as outmoded and inefficient and replaced it with the concept of the administrative tribunal. In the administrative tribunal, the powers of government would be consolidated, and decisions could be made efficiently and without gridlock.

MANY MODERN ADMINISTRATIVE AGENCIES CLEARLY VIOLATE THE CONSTITUTION'S PRINCIPLE OF SEPARATION OF POWERS BY COMBINING LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWER IN THE SAME HANDS.

James Landis, a leading adviser to Franklin Roosevelt, wrote that the administrative state has arisen due to "the inadequacy of a simple tripartite form of government to deal with modern problems."[22] "Without too much political theory but with a keen sense of the practicalities of the situation," he explained, administrative agencies have been created "whose functions embraced the three aspects of government. Rule-making, enforcement, and the disposition of competing claims [adjudication] were all intrusted to them."[23]

In 1914, influential Progressive author Herbert Croly similarly described what "has been called a fourth department of the government." This department "does not fit into the traditional classification of

20. James Madison, *Federalist* No. 47, in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Hanover, N.H.: Wesleyan University Press, 1961), p. 324. Subsequent references to *The Federalist* cite essay number and page in the Cooke edition.
21. Madison, *Federalist* No. 51, p. 349.
22. Landis, *The Administrative Process,* p. 1.
23. Ibid., p. 2.

governmental powers. It exercises an authority which is in part executive, in part legislative, and in part judicial.... It is simply a convenient means of consolidating the divided activities of the government for certain practical social purposes."[24]

Progressives who wanted to get around the idea of the separation of powers began the practice of creating these administrative agencies containing all three powers of government consolidated in the same hands for the sake of convenience and efficiency. Their desire to remove checks and balances from these institutions was based on a view of human nature entirely opposed to the view of the Founders.

TODAY, THE AVERAGE ADMINISTRATIVE AGENCY CONTAINS LAWMAKING, EXECUTIVE, AND JUDICIAL POWERS.

When Madison explained the separation of powers in *Federalist* No. 51, he explained that powers had to be separated because human beings were flawed, and human beings were going to be holding the power: "If angels were to govern men, neither internal nor external controls on government would be necessary." Because we cannot find angels to govern us, we must limit the power given to human beings who are inherently flawed and tempted by power. By taking away those checks on government that the separation of powers provided, the Progressives implicitly assumed that the officials in administrative agencies would behave like angels, not mere human beings, and that they could be trusted to hold all of the powers of government in their hands.

Today, the average administrative agency contains lawmaking, executive, and judicial powers. Agencies make rules that carry the force of law; investigate, prosecute, and enforce violations of these rules; and judge violations of the rules they make. Gary Lawson's description of the powers held by the Federal Trade Commission is illustrative:

> Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission....[25]

Typical agencies such as the FTC, as Lawson explains, make substantive rules carrying the force of law; investigate, prosecute, and enforce violations of these rules; and have administrative law judges and hearing officers empowered to decide controversies based on agency rules.

The Supreme Court has given such profound violations of the separation of powers a free pass by saying that agencies' powers are "quasi-legislative" and "quasi-judicial" as well as executive.[26] But this judicial sleight of hand merely conceals the damage that these administrative agencies do to the separation of powers. Whether we call agency rules "laws" or not, they still carry the force of law, and whether we call agency adjudications "judicial" or not, they still resolve controversies much as the judicial process is designed to do. As law professor Bernard Schwartz once wrote:

> [I]t has become wholly illogical to grant the fact of the legislative power of the commissions and still to deny the name. When the Supreme Court in 1952 upholds an indictment of a trucker for violation of a regulation

24. Croly, *Progressive Democracy,* p. 364.

25. Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review,* Vol. 107 (1994), pp. 1237–1238. For a more accessible version of Lawson's argument, see Lawson, "Limited Government, Unlimited Administration: Is It Possible to Restore Constitutionalism?" Heritage Foundation *First Principles Series Report* No. 23, January 27, 2009, http://www.heritage.org/research/reports/2009/01/limited-government-unlimited-administration-is-it-possible-to-restore-constitutionalism.

26. The phrase comes from the case of *Humphrey's Executor,* 295 U.S. 602 (1935).

> promulgated by the Interstate Commerce Commission prescribing certain compulsory safety precautions for trucks transporting inflammables or explosives, perhaps the ICC regulation is only a quasi-law. But when the trucker is convicted of violating such regulations, we may be certain that they do not incarcerate him in a quasi-cell.[27]

Regardless of what the Supreme Court has said, these agencies exercise legislative, executive, and judicial powers. People who are adversely affected by agencies' decisions can eventually appeal to an independent "Article III" court, but only after all administrative appeals have been exhausted.[28] In cases where an administrative law judge makes an initial judicial decision (called an "adjudication"), the losing party can usually appeal to the agency itself to be heard by the heads of the agency. In other words, the initial appeal in most cases is from the agency's administrative law judge to the agency itself.

2. Delegation Run Riot

Article I, Section 1 of the Constitution declares that "all legislative powers herein granted shall be vested in a Congress." The Constitution therefore requires that legislative powers granted in our founding document be exercised by Congress and by Congress only. Congress cannot rightfully delegate its legislative powers to another authority. The administrative state violates this principle of non-delegation by placing legislative powers in the hands of unelected bureaucrats.

The principle of non-delegation reflects the Framers' commitment to the idea that sovereignty resides in the people alone and cannot be placed elsewhere. The people are the only source of political authority, and government rightfully possesses only the power that the people consent to give it. Governments, as the Declaration of Independence says, derive "their just powers from the consent of the governed." In coming together to form a government, the people never relinquish their power; their natural rights are "unalienable." They merely vest power in the hands of trustees.

This way of thinking results in the non-delegation doctrine. The British philosopher John Locke, whose writings greatly influenced the American Founding, derived the doctrine of non-delegation specifically from the theory of the sovereignty of the people. He famously wrote that "The power of the *Legislative*" is "derived from the People by a positive voluntary Grant and Institution" and "can be no other, than what that positive Grant conveyed." Therefore, "the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands."[29]

That the Founders adopted Locke's theory of the social compact and non-delegation is evident in *Federalist* No. 84, in which Alexander Hamilton explains that the Constitution has no need for a bill of rights because "bills of rights are in their origin, stipulations between kings and their subjects... reservations of rights *not surrendered* to the prince."[30] They "have no application to constitutions professedly founded upon the power of the people, and executed by their *immediate* representatives and servants. *Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations*."[31]

REPRESENTATIVES DO NOT ACTUALLY POSSESS POWER; THEY MERELY HOLD IT IN TRUST. THEREFORE, THEY CANNOT DELEGATE THE POWER DELEGATED TO THEM BY THE PEOPLE.

Hamilton argues that whenever the people come together and create a government to be executed by their immediate representatives, they retain their power and sovereignty. The representatives do not actually possess power; they merely hold it in trust. Therefore, they cannot delegate the power delegated to them by the people.

For over one hundred years following the ratification of the Constitution, there was widespread agreement that legislative power could not be delegated to the other branches of government. As Chief Justice John Marshall matter-of-factly declared in the 1825 case of *Wayman v. Southard*, "It will not be contended that Congress can

27. Bernard Schwartz, "The Administrative Agency in Historical Perspective," *Indiana Law Journal,* Vol. 36 (1961), p. 273.
28. See Administrative Procedure Act, 5 U.S.C. § 704.
29. John Locke, *Two Treatises of Government,* ed. Peter Laslett, student ed. (New York: Cambridge University Press, Cambridge Texts in the History of Political Thought, 1988), ch. 11, §141, p. 363. Hereinafter cited as Locke, Second Treatise, followed by section number. Emphasis in original.
30. Alexander Hamilton, *Federalist* No. 84, p. 578.
31. Ibid. (emphasis added).

delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[32] As late as 1892, the Supreme Court declared in *Field v. Clark*, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[33]

Yet by 1916, Elihu Root (Secretary of State, U.S. Senator, and winner of the 1912 Nobel Peace Prize) famously observed that "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[34] Since that time, the administrative state has continued to expand on the foundation that Congress can delegate its legislative powers with impunity.

Congress does this, of course, without explicitly admitting it is delegating its power. It still passes laws, but the laws are often couched in vague terms and focus on broad aspirational aims. The laws do not contain actual rules and standards with which citizens must comply. The actual rules and standards in any given area—the real letter of the law—are to be developed, drafted, and implemented by regulators.

The Supreme Court has not invalidated any laws that delegate legislative power since 1935 and is unlikely to do so anytime soon. At the same time, however, the Court has never endorsed the idea that Congress *can* delegate legislative power. Rather, the Court avoids the issue by saying that Congress has *not* delegated power if the law authorizing an agency to act contains an "intelligible principle" to guide it in the process of making regulations.

The problem with the Court's approach is that most of these authorizing statutes do not contain intelligible principles at all and do not meet the traditional meaning of "law." To make this argument, we have to understand the proper definition of a law. A law, according to Madison in *The Federalist*, "is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?"[35]

THE PROBLEM WITH THE SUPREME COURT'S APPROACH IS THAT MOST OF THESE AUTHORIZING STATUTES DO NOT CONTAIN INTELLIGIBLE PRINCIPLES AT ALL AND DO NOT MEET THE TRADITIONAL MEANING OF "LAW."

A bill that is passed by a legislature and merely declares that an agency should regulate the exchange of securities in the "public interest" fails that definition. Laws are rules and measures of action. If a statute passed by Congress does not contain a rule and measure of action that can be understood and followed by regulated entities, it is not a law. It is merely an assignment of responsibility to some other entity to make the law. A quick look at a couple of congressional delegations to agencies illustrates these points.

- The Communications Act of 1934 (most recently amended in 2000), creating the Federal Communications Commission, authorizes the FCC to grant broadcast licenses to applicants "if public convenience, interest, or necessity will be served thereby."[36] There is no rule here. The law essentially tells the commission to make the law in deciding who gets broadcast licenses and for what purpose.

- Likewise, the Occupational Safety and Health Act of 1970, creating OSHA, authorizes OSHA to create "occupational safety and health standards" that are "reasonably necessary or appropriate to provide safe or healthful employment." In creating these standards, the law tells OSHA to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health."[37] Like the Communications Act, the Occupational Safety and Health Act, though passed legitimately by Congress, is not a law in any traditional sense. It provides no rules or standards. Rather, it tells OSHA essentially to make safety laws on the basis of its expertise. As a result, the real laws are regulations that are passed by OSHA, not by Congress.

Congress delegates its legislative powers to agencies like these all the

32. *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, at 42–43 (1825).
33. Field v. Clark, 143 U.S. 649, 692 (1892).
34. Elihu Root, *Address on Citizenship and Government (1916),* 584; quoted in James Landis, *The Administrative Process,* p. 50.
35. Madison, *Federalist* No. 62, p. 421.
36. 47 U.S.C. § 307 (2000) (first enacted in 1934).
37. 29 U.S.C. § 652(8); 29 U.S.C. § 655(b)(5).

time, and while the courts have never granted that Congress can entirely delegate legislative power, they have long admitted that Congress delegates some powers when it writes such vague statutes. In a leading case, the Supreme Court acknowledged that "we have upheld, again without deviation, Congress' ability to delegate power under broad standards." The reason, the Court claimed, is that "in our increasingly complex society...Congress simply cannot do its job absent an ability to delegate power under broad general directives."[38] In that case, the Supreme Court upheld Congress's delegation of power to define the penalties for hundreds of different crimes to the U.S. Sentencing Commission. The Court has even allowed Congress to delegate the power to determine criminal penalties to an agency.

3. The Abandonment of Republicanism

Central to the Founders' conception of good government is republicanism. Republican government is not an easy term to define, but there are a few principles that are essential to it.

James Madison remarks in *Federalist* No. 39 that "we may define a republic to be, or at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people." Furthermore, it "is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people."[39]

In other words, republicanism requires that government derive its powers "directly or indirectly" from the people. Each of the three constitutional branches of government is republican by this definition—even the Supreme Court, whose justices are selected indirectly by the people through the process of presidential appointment. Republicanism, in short, is "a government in which the scheme of representation takes place."[40]

POPULAR REPRESENTATION THROUGH ELECTIONS IS CENTRAL TO THE IDEA OF REPUBLICANISM. THEREFORE, REPUBLICANISM REQUIRES THAT ALL THE LAWS BE MADE BY ELECTED OFFICIALS WHO REPRESENT THE PEOPLE.

The concept of popular representation through elections is central to the idea of republicanism. Therefore, republicanism requires that all the laws be made by elected officials who represent the people. It is *election* by *voting* that is central to republicanism. As Madison explains, "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government."[41]

Suffrage and elections are central to republicanism for two reasons: First, the Declaration of Independence declares as a matter of natural right that "government derives its just powers from the consent of the governed." Second, as a practical matter, it is easier for the people to control which laws are made through the process of representation.

"As it is essential to liberty that the government in general, should have a common interest with the people," writes Madison, "so it is particularly essential that [Congress] should have an immediate dependence on, and an intimate sympathy with the people. Frequent elections are *unquestionably* the *only policy* by which this dependence and sympathy can be secured."[42] The "only way" to ensure that representatives have a common interest with the people to whom they are supposed to be responsible is the establishment of regular elections, and it is "particularly essential" that the legislature be subject to regular elections. This is why Madison concludes that:

> [The] aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government.[43]

As a matter of principle, then, republicanism requires that the laws

38. *Mistretta v. U.S.*, 488 U.S. 361 (1989).
39. Madison, *Federalist* No. 39, p. 251.
40. Madison, *Federalist* No. 10, p. 62.
41. Madison, *Federalist* No. 52, p. 354.
42. Ibid., p. 355 (emphasis added).
43. Madison, *Federalist* No. 57, p. 384.

of the country be made by representatives who are elected by the people. The right to vote for representatives is central to the Founders' understanding of republicanism.

The administrative state violates this cardinal principle by transferring the power to make laws to agencies composed of unelected bureaucrats. This was the deliberate result that the creators of the administrative state desired. In "The Study of Administration," a seminal article written in 1887, Woodrow Wilson complained:

> The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes.... Our success is made doubtful by that besetting error of ours, the error of trying to do too much by vote. Self-government does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one's own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens.[44]

For Wilson and many other Progressives, the thing to overcome was America's attachment to popular sovereignty, to the idea of government by consent.[45] Today, the overwhelming majority of those who staff the administrative state are not chosen by election or appointed by an elected official, but rather enter through the civil service system, which insulates agency personnel from public control.

The central problem with bureaucrats legislating is *not* that they are unaccountable (although in most cases they are). It is important to be clear on this. Accountability is not the central idea in republican government. The problem with lawmaking by bureaucrats is that agency personnel are unelected, which *is* central to republicanism. This distinction matters because many defenders of the administrative state think that it can be made legitimate simply by making it more "accountable" through congressional oversight. But republicanism is not satisfied by mere accountability; it requires that "the elective mode of obtaining rulers" is the way we govern ourselves.

4. The Administrative Process

As we have already seen, many administrative agencies do not just have the legislative and executive powers of government. They also wield the power of adjudication—the judicial power to decide particular cases. Richard A. Epstein notes that "[t]he rise of the administrative state typically substitutes administrative agencies for the judges and juries that try cases."[46]

Judicial officers, usually called administrative law judges or hearing officers, are used in many agencies, from the Department of Housing and Urban Development to the Fish and Wildlife Service to the U.S. Department of Agriculture to the Federal Trade Commission. As political scientist Robert Lorch explains:

> [I]t is the union of policeman, prosecutor, legislator, and judge that so sharply separates administrative adjudication from judicial adjudication.... Courts have abandoned many sectors of adjudication to administrative quasi-courts which have power to apprehend certain kinds of wrongdoers, bring charges, prosecute them, and finally to judge them.[47]

These agencies have the power to adjudicate particular controversies and, in this way, exercise what is tantamount to the judicial power of government. Even the Supreme Court has recognized that the role of the modern administrative law judge is "functionally comparable to that of a judge."[48] But the administrative process of adjudication is profoundly different with respect to the *principles* upon which cases are brought and decided. These important differences between the administrative and judicial processes of adjudication deprive citizens and regulated entities, whether businesses or private associations, of important protections offered by the rule of law.

The shift to administrative adjudication marks a radical departure from our rule-of-law tradition. When courts apply the law to a certain set of facts in a specific case, they are bound by rules and checks on the

44. Wilson, "The Study of Administration," p. 209.

45. Admittedly, the Progressives advocated many reforms to establish direct democracy in the area of politics, such as the direct primary as well as the initiative, referendum, and recall. However, these same reformers also sought to insulate the exercise of administrative power from the direct control of the people.

46. Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge, Mass.: Harvard University Press, 2011), p. 153.

47. Robert S. Lorch, *Democratic Process and Administrative Law* (Detroit: Wayne State University Press, 1980), pp. 31–32.

48. *Butz v. Economou,* 438 U.S. 478 (1978).

judge's discretion. These checks ensure certainty and predictability in the law and promote the rule of law rather than the rule of judges.

Administrative agencies are designed to be freed from the technical legal rules that protect individual rights so that their decisions promote efficiency for the public rather than the rights of the parties in a specific case.[49] As Epstein explains, adjudication in courts "focuses on the immediate parties" in a case "in conscious disregard of other social consequences." In order to promote a flawed notion of social justice, "individuals receive less protection before administrative tribunals than they do in courts."[50] This basic difference between administrative agencies and courts explains why the Progressives were determined to transfer power over specific cases from courts to agencies.

Importantly, it has generally been understood that the powers of adjudication exercised by administrative agencies are the same as those that were traditionally exercised by courts. As legal scholar Bernard Schwartz has noted, "From an analytical point of view, in fact, the powers of decision conferred upon many federal agencies could easily have been vested in the courts.... [T]he administrative agency is vested with judicial power just as are the ordinary courts of justice."[51]

The great Progressive theorist Herbert Croly admitted as much when he praised the superiority of the administrative court for its foundation in "a collective social ideal," compared to the traditional court's grounding in "the protection of individual rights." "A judge whose essential function is the application of legal rules impartially to specific cases, and who is obliged to accept the facts as recorded by interested litigants or as determined by juries," wrote Croly, "cannot become a satisfactory or a sufficient servant of a genuinely social policy."[52] In other words, administrative agencies *had* to take over the judicial power if the process of adjudication was to become more focused on social justice than on individual rights.

In the Progressive view, the administrative process of adjudication is better at bringing about desired socially just outcomes for three principal reasons.

1. **In traditional Anglo–American jurisprudence, courts are bound by precedent to build upon previous cases, whereas administrative agencies are free to decide disputes without regard to past cases.**

   The virtue of the traditional approach to jurisprudence, in the Founders' view, was that through common law, courts could establish rules for the regulation of society that reflected the public's views and also lent stability to the law through respect for established precedent. The Progressives' view of administration was that it always needed to keep up with the times to root out new and growing injustices, all of which will be completely different from those which came before. As Lorch explains, the agencies "can openly decide cases by looking through the windshield at what lies ahead rather than through the rear-view mirror at what lies behind. They are, in theory, more flexible, less afflicted by judicial lag."[53]

   If an agency deviates from its pattern of previous decisions, it may raise red flags for a reviewing court, but the agency receives deference even for decisions that deviate from previous decisions.[54] As a result, agency decisions are much less predictable, and the laws agencies make are much less stable. In practice, agencies change their minds all the time rather than following precedents.

   In the 1990s, the FDA, which had argued for decades that it was not authorized to regulate cigarettes, suddenly changed its mind and issued regulations. More recently, the FCC changed its mind in how it would enforce its rules prohibiting "indecency" in public broadcasting. The FCC had stated for years that it would ban only repeated expletives (rather than "fleeting expletives"). Following two broadcasts of the

49. Bernard Schwartz, "The Administrative Agency in Historical Perspective," *Indiana Law Journal,* Vol. 36 (1961), pp. 264–265.
50. Epstein, *Design for Liberty,* pp. 45, 151. See also p. 49: "The focus of any system of corrective justice is on the immediate interaction of the parties, in conscious disregard of other social consequences."
51. Schwartz, "The Administrative Agency in Historical Perspective," p. 266.
52. Croly, *Progressive Democracy,* p. 368.
53. Lorch, *Democratic Process and Administrative Law,* p. 29.
54. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983).

Billboard Music Awards in which offensive language was used, the FCC changed its mind and said that "fleeting expletives" were also banned and fined the Fox Corporation. The fine was upheld by the Supreme Court.[55]

2. **The nature of the judicial process prevents courts from actively seeking out and eliminating injustices in society.**

   The judicial power is passive by nature. Judges can only decide cases that are brought to them and can only decide particular cases one at a time. Administrative agencies, on the other hand, can actively seek out injustice and use all of the combined powers of government to eliminate it. They do not have to wait for cases to be brought to their attention. For instance, if a manufacturer violates an OSHA safety regulation, OSHA does not have to wait for an affected worker to bring a lawsuit against his employer. It can investigate and prosecute the employer on its own. Judges do not have this kind of power.

3. **Courts decide cases based on a process that values the rights and interests of the individuals who are parties to a particular case.**

   The rules for evidence, rights to counsel, and the right to examine witnesses all assume the basic idea that the purpose of a court is to decide disputes between particular individuals. The administrative process of adjudication, on the other hand, decides a case between particular parties, but with a view to the social interests at stake rather than the rights and interests of particular individuals.

As Lorch writes, "A court is a little like an umpire in a ball game. Its job, like the umpire's, is mostly limited to looking after the relationship of the two combatants on the field rather than looking after the relationship of events on the field to the public interest." An administrative agency is like an official "who could make judgments not alone to satisfy the teams on the field, but to satisfy the demands of the public in the bleachers."[56]

For instance, when the FCC decides whether to grant a permit to a broadcaster, its administrative law judges are directed by law to look to the public interest rather than to the particular merits of the potential broadcaster to determine whether the license should be granted. In similar fashion, the chairman of the FCC issued an order effectively killing the merger of T-Mobile and AT&T, claiming that the deal was not in the public interest.[57] The case was decided by administrators rather than by judges, who were looking to the public interest rather than the merits of the individuals involved in the case. In any conflict between the rights of individuals and the public interest, the administrative process is designed to place the public interest before individual rights.

The shift to the administrative process as opposed to the judicial process for resolving disputes between government and the people presents a massive problem for the protection of individual liberties. The rule of law has proved to be one of the most important foundations for preserving liberty. For it to flourish, citizens must have access to fair tribunals for the resolution of individual cases and disputes.

THE ADMINISTRATIVE STATE TRANSFERS THE PROCESS OF ADJUDICATION TO JUDGES EMPLOYED BY THE VERY AGENCIES THAT MAKE THE LAW.

The administrative state transfers the process of adjudication to judges employed by the very agencies that make the law. These agencies can actively seek out cases; decide cases without traditional standards of evidence, process, and precedent; and pursue "social justice" rather than the just result between two parties in a case. After agency officials make their judicial determinations, affected parties typically have to appeal from the agency to the agency, exhausting all agency remedies before they can get to an independent court. Moreover, once the appeal reaches an independent court, the court will often choose

55. See *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800 (2009).

56. Lorch, *Democratic Process and Administrative Law,* p. 33.

57. Chloe Albanesius, "FCC Chairman Opposes AT&T, T-Mobile Deal, Wants Hearing," PCMag.com, November 22, 2011, http://www.pcmag.com/article2/0,2817,2396782,00.asp (accessed May 28, 2012); Cecelia Kang, "FCC Chairman Genachowski fires back at AT&T, T-Mobile," *The Washington Post,* May 8, 2012, http://www.washingtonpost.com/blogs/post-tech/post/fcc-chairman-genachowski-fires-back-at-atandt-t-mobile/2012/05/08/gIQAVXpmAU_blog.html (accessed May 28, 2012).

to defer to the conclusion that the agency reached.

In short, although the problems of the combination of powers, the delegation of legislative power to agencies, and the anti-republican nature of agencies are severe, the problem presented by the administrative process is at least as acute as these others.

Part 3: The Alternative—Constitutional Government

Reforming the administrative state would not mean an end to all regulation. The choice is not between the current state of unconstitutional overregulation and a Wild West of laissez-faire. What we need is responsible regulation within the constitutional framework on which this country stands.

Regulation has been prevalent in American society since the time of the Founding. Regulation has never been understood to be by definition in conflict with the principles upon which America was founded. But the administrative state eliminates the possibility of *responsible* regulation: both responsible in the sense of accountability and responsible in the sense of justice.

Whenever the possibility of reforming or eliminating our modern bureaucracy is brought up, the typical response is twofold: We need the expertise of the agencies in our modern, hypercomplex world, and getting rid of bureaucracy would mean a return to the anarchy of laissez-faire economics with child labor, unsafe food, and unregulated markets. At best, these responses are based on ignorance of how regulation has worked traditionally. At worst, they are dishonest and intended to demonize any attempt to challenge the *status quo*.

Both of these arguments are disproved by looking at the Founders' approach to regulation. The Founders responded to an interdependent and complicated economy with regulations that were consistent with natural rights and—just as important—established through a constitutional process rather than an unconstitutional fourth branch of government.

THE FOUNDERS RESPONDED TO AN INTERDEPENDENT AND COMPLICATED ECONOMY WITH REGULATIONS THAT WERE CONSISTENT WITH NATURAL RIGHTS AND ESTABLISHED THROUGH A CONSTITUTIONAL PROCESS RATHER THAN AN UNCONSTITUTIONAL FOURTH BRANCH OF GOVERNMENT.

Regulation During the Founding

Contrary to the views of many historians, there was a significant amount of regulation and administration in early America. Although it is fashionable to think that the Founders' world was so simple that the economy did not need regulation, the Founders had to deal with a complicated economy by establishing regulations to keep it orderly.

The Founders' government did not operate on laissez-faire principles. In fact, even the thinkers who are normally associated with laissez-faire actually opposed such an approach. Friedrich Hayek himself wrote that "there is undeniably a wide field for non-coercive activities of government and that there is a clear need for financing them by taxation.... There are common needs that can be satisfied only by collective action and which can be thus provided for without restricting individual liberty."[58]

In his classic *The Road to Serfdom*, Hayek was even more explicit: "Probably nothing has done so much harm to the [classical] liberal cause as the wooden insistence of some [classical] liberals on certain rough rules of thumb, above all the principle of laissez faire."[59] He argued that "It is important not to confuse opposition against this kind of planning with a dogmatic laissez faire attitude"[60] and that "the term 'laissez faire' is a highly ambiguous and misleading description of the principles upon which a liberal society is based."[61]

Even Hayek believed that laissez-faire was not a helpful principle to insist upon as an alternative to our all-encompassing administrative state. Regulation is not necessarily harmful to liberty as long as it is understood the right way. To understand regulation the right way, we should look at how the Founders approached regulation.

By the constitutional structure established by the Founders, state and local governments had the authority to regulate for the sake of safety, health, and the preservation of morals under a broad category of powers called the "police powers." State and local governments exercised these powers to a great extent. The regulations created by this authority were central to the day-to-day functioning of society in early America.

58. Friedrich A. Hayek, *The Constitution of Liberty*, paperback ed. (Chicago: University of Chicago Press, 1978), p. 257.
59. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994), p. 21.
60. Ibid., p. 41.
61. Ibid., p. 89.

Some of these regulations look very familiar to us today. Inspection of goods before they could be sold on the market was common. In many states, town selectmen and other elected local officials had the power to inspect commodities such as beef, pork, fish, lumber, gunpowder, and tobacco before they could be exported from the state for sale. They would inspect the quality of these items and brand goods that had been inspected and approved. These inspections included regulations that covered packing and dimensions of containers as well as quality. They were practiced in states as different as Massachusetts, Maryland, South Carolina, and Ohio.

BY THE CONSTITUTIONAL STRUCTURE ESTABLISHED BY THE FOUNDERS, STATE AND LOCAL GOVERNMENTS HAD THE AUTHORITY TO REGULATE FOR THE SAKE OF SAFETY, HEALTH, AND THE PRESERVATION OF MORALS UNDER A BROAD CATEGORY OF POWERS CALLED THE "POLICE POWERS."

Licensing of occupations was also common in early America. In Pennsylvania, innkeepers, liquor merchants, tavern owners, and others could operate only with a license. In Massachusetts, doctors could not practice without a license. Even the federal government created licensing requirements for fur traders. Common carriers such as ferries and carriages were also licensed in this way. In Illinois, every ferry keeper was required to keep a post on board that listed the maximum rates that he could charge under state law. The selling of alcohol was heavily licensed in many states, which used licensing to enact prohibition. In states such as Massachusetts and Maine, some local officials were elected based on promises to issue *no* liquor licenses, which ensured prohibition in those areas.

Other regulations were also common during the Founding period. Banks were regulated through charters of incorporation and could be created only after the state government granted permission. These grants of permission would be issued by the state legislatures and would often contain regulatory requirements in the charters. For example, the Vermont state legislature in 1833 chartered "The Farmer's Bank" on the condition that it could charge no more than 6 percent interest on loans.

The basic lesson is this: In the Founders' view, economic regulation was not fundamentally hostile to the liberty and property rights of citizens. *Some* regulation is acceptable and even necessary to protect a free society.

Do Regulations Violate Individual Rights?

Of course, the existence of these regulations during the American Founding does not mean that they are all necessarily legitimate. One might argue that they were holdovers from a previous era and inconsistent with the fundamental rights of liberty and property.

However, these regulations were regularly defended by thinkers and judges during the Founding period as conducive to the protection of liberty and property rights, not violations of those rights. The arguments given by the Founders in *defense* of regulation also explain their understanding of the *limits* on regulation. They help us understand which regulations are compatible with individual rights and which trample on individual rights.

Usually, the defense of regulation was offered by judges during the Founding period. This is because many of the regulations just described would be challenged in court, and the judges would offer arguments in defense of their legitimacy when deciding cases. When they defended the kinds of regulations just described, these judges offered three kinds of arguments.

The first argument was that the common good of society benefits when certain kinds of regulations are enacted. Chancellor James Kent, who served on the Supreme Court of New York and the Chancery Court of New York (hence the title "Chancellor"), wrote in one case that "slaughter-houses, operations offensive to the senses, the deposit of power, the application of steam powder to propel cars, the building with combustible materials, and the burial of the dead" may all be regulated "on the general and rational principle that...private interests must be made subservient to the community."[62]

Under this argument, certain activities became "clothed" or "affected" with a public interest when they involved a threat to the safety or health of the community. Building with combustible materials or the burial of the dead involve legitimate health and safety issues that require government regulation to protect the health and safety of others. In a community where everyone has individual rights, the exercise of one

62. Chancellor James Kent, *Commentaries on American Law* (New York, 1836), Vol. 2, p. 340.

person's liberty is bound to interfere at times with the liberty of another. When—and *only* when—the health or safety of others is implicated in one's action, the government has a role in regulating citizens' actions to ensure that everyone's liberty is preserved.

The second argument given was that the use of liberty and property has to be regulated to prevent actual injuries to others. The rule applied by courts was that "persons must use their property so as not to harm others" (the translation of the Latin phrase *sic utere tuo ut alienum non laedas*).

In this case, the injury to be prevented is not an injury to the community at large (as in the case of burying the dead), but a specific injury that threatens the rights of another citizen. For instance, nuisances such as barking dogs or pigsties can directly affect the value and use of the property of others. In such cases, the rights of one person to use his property (to have loud dogs or smelly pigsties) affects the rights of another person to enjoy his property. Regulation under nuisance laws, in the Founders' view, is legitimate to deal with these cases.

The third and most interesting argument given by the Founders is that certain kinds of regulations do not hinder the exercise of liberty and property. Rather, the opposite is true: Without certain kinds of regulations, our liberty and property rights would actually be *less* secure. In the case of *Commonwealth v. Blackington*, Lemuel Shaw, a prominent judge who served as Chief Justice of the Massachusetts Supreme Court, argued that regulations "are necessary to define, secure, and give practical efficacy to the right itself." Laws dealing with inspections, for example, "benefit our commerce in those articles, at home and abroad," and "all laws made with a view to revenue, to health, to peace and good morals, are of this description."[63]

According to Shaw's argument—an argument with which the Founders would have agreed—regulations dealing with inspections, public health, licensing, and the like enhance our natural rights to liberty and property. A merchant's right to acquire property is enhanced by government regulations guaranteeing the quality of products exchanged in the marketplace. Consumers have confidence in the quality of the goods they are buying. In this view, well-crafted (and limited) regulations do not violate liberty and property rights: They expand them. The history of these regulations in early America illustrates this idea at work. Many of the inspection laws were supported by merchants, whose reputations both within the state and in other states were enhanced by the regulations.

UNDER THE FOUNDERS' VIEW, REGULATIONS CAN BE JUSTIFIED ONLY IF THEY INVOLVE ACTIONS DIRECTLY AFFECTING PUBLIC HEALTH OR SAFETY IN WHICH THE HEALTH OF THE COMMUNITY OR THE RIGHTS OF OTHER INDIVIDUALS ARE IMPERILED.

These three arguments from the Founding in defense of certain kinds of regulations help us to distinguish between regulations that are compatible with liberty and those that are not. The modern understanding, embraced by our administrative state, claims that regulation must be all-encompassing and must govern every aspect of citizens' lives. Its purpose, furthermore, is not to protect natural rights, but to subordinate the rights of individuals to some vague, abstract common good.

Under the Founders' view, by contrast, regulations can be justified only if they involve actions directly affecting public health or safety in which the health of the community or the rights of other individuals are imperiled. Beyond this, the only regulation that is legitimate is regulation that enhances liberty and property rights—for example, the inspection and licensing of certain (but not all) goods and occupations.

The scope of regulation under the Founders' approach is certainly narrower than the scope of regulation we have under the administrative state. It is also much less centralized in the federal government. But it is not a laissez-faire approach to regulation. It allows for regulations that protect and enhance individual rights.

The Alternative to the Administrative State

We see that regulation has always existed in America, even during the time of the Founding, and that certain kinds of regulations are perfectly consistent with natural rights. These regulations, however, have to be formulated and implemented in the right way. The *form* and *structure* of the government are important for ensuring that regulation does not trample on the liberties of citizens.

The Founders took care to establish institutional structures for regulating that ensured the safety of liberty. Their model provides us with a viable alternative to the administrative state and embodies three basic principles.

63. *Commonwealth v. Blackington*, 24 Pick. 352, 357 (1837).

1. Administrative officials should exercise closely confined powers. Administrative officials should not have open-ended discretion; rather, their duties should be carefully described so that they are executing the will of the legislature as much as possible. The less discretion administrators have, the better. Alexis de Tocqueville, for instance, observed in his famous book *Democracy in America* that in "the New England states, the legislative power extends to more objects than among us [in France]. The legislator penetrates in a way into the very heart of administration.... [I]t thus encloses secondary bodies and their administrators in a multitude of strict and rigorously defined obligations."[64]

The more that administrative power is defined by legislatures, the more control the people have over the administration of law. Rather than trusting the "experts" to do what is best for them by granting wide powers to administrators, the Founding generation carefully limited administrative discretion so that it would be accountable. Today, by contrast, Congress grants wide and extensive powers to administrators who are hardly limited in their discretion by the laws that give them authority.

2. Use courts to administer the law where possible. As Cass Sunstein, a prominent law professor and former head of the Office of Information and Regulatory Analysis, has explained, during the Founding era, "the United States—unlike European countries—lacked a well-defined bureaucratic apparatus." Therefore, our regulations "could be found principally in judge-made rule of the common law. From corporate and property law to family law, judges performed the basic regulatory functions that might otherwise have been carried out by bureaucrats."[65]

These common-law principles were developed by judicial precedents and applied in cases decided in the courts. Citizens could bring suits alleging torts, nuisances, and the like, which would be decided according to rules established by precedent. Courts, rather than agencies, developed many of the regulatory requirements of the state and local governments. Courts were preferable to administrators, in the Founders' view, because of judicial adherence to the intentions of the law as opposed to administrators' using the law as mere guidance for their own lawmaking.

THE TASK IS NOT TO ABOLISH REGULATION BUT TO REFORM IT SO THAT IT FITS WITH THE CORE PRINCIPLES OF THE CONSTITUTION: SEPARATION OF POWERS, REPUBLICANISM, AND FEDERALISM.

As a result, despite the fact that modern courts often reverse this equation, the traditional judicial process made regulations both safe and accountable. The judicial process was safe because it afforded legal protections to individual citizens, whereas an administrator could make a summary decision without the protections of due process. It also ensured predictability, since the common law was based on precedent and the basic norms of the community,[66] and was accountable because private citizens and juries were intimately involved in the exercise of judicial power at the local level.

3. Decentralize power to local elected officials. Many regulations were decentralized to the local level wherever possible. This had the effect of making regulation accountable, because it was performed by people who were known by local citizens and who had knowledge of the local conditions where they lived and regulated. As Tocqueville explained, in New England, "the greatest part of administrative powers is concentrated in the hands of a small number of individuals elected each year whom they name selectmen."[67] These selectmen were local citizens, known to the people of the town or township where they lived, and were elected by their fellow citizens. This ensured that administration would not be done by some external authority unknown to the citizens and unaccountable to them.

These three principles—limiting the discretion of administrators, using courts instead of agencies to enforce the law, and decentralizing administrative power to local elected officials—ensured that legitimate regulations were administered in a sound manner. Regulation would be defined as much as possible by legislatures, where the elected representatives of the people would make policy decisions. It would also follow the rule of law by involving

64. Tocqueville, *Democracy in America,* p. 69.

65. Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990), p. 18.

66. See James Stoner, *Common Law and Liberty* (Lawrence: University Press of Kansas, 2003).

67. Tocqueville, *Democracy in America,* p. 59.

the courts of law and would be local and accountable through decentralization.

This survey of the Founders' approach to regulation shows that the alternative to today's all-encompassing bureaucracy is not to abolish regulation altogether. Rather, the alternative is to make regulation and administration compatible with individual rights and liberties. The task is not to abolish regulation but to reform it so that it fits with the core principles of the Constitution: separation of powers, republicanism, and federalism.

We do not have to abandon our cherished ideals simply because modern life is complex. In fact, sticking to our principles will help us *improve* regulation from the unfortunate condition that it is in today.

Part 4: What Can Be Done?

Can the administrative state be dismantled, or is it a necessary outgrowth of the complexity of modern political life? Most people, even those who loathe the existence of the administrative state, simply resign themselves to its inevitable existence.

But serious reform *is* possible. To the extent that the modern regulatory system has become an administrative state, it must be dismantled. This does not require that we eliminate the entire welfare state, shut down every federal agency, or close down most federal departments. It does require sound, strategic thinking based on an understanding of how constitutional principles should be applied today.

Each of the three legitimate branches of government has a role to play in restoring constitutional government and reining in the unconstitutional power of the administrative state.

- Congress can take concrete and attainable steps to restore its constitutional responsibility for making the laws.

- The President can take measures to attain greater control of the truly executive functions of administrative agencies and federal departments, restoring the chief executive's constitutional authority to oversee executive branch affairs (and creating incentives for Congress to stop delegating its power).

- The courts can take more responsibility in reviewing the decisions of administrative agencies and federal bureaucracies, both to prevent the expansion of their powers and to preserve the rule of law and the rights of citizens who are subject to the agencies' and departments' control.

Congress can also restore to the President and the courts some of their traditional powers to reintroduce the checks and balances on which liberty rests.

1. Congress's Role: Restoring Responsibility. The "keystone" or linchpin of the administrative state is Congress.[68] It is Congress that delegates legislative power to the bureaucracy, creating the engine on which the administrative state runs. Since it has the power of the purse, Congress funds the administrative state, providing financial support that the bureaucracy values highly. As a result of Congress's substantial powers, agencies and departments listen carefully when Congress speaks to them.

A variety of practical approaches could be adopted to restore Congress's constitutional responsibility to make laws.[69] Ironically enough, one of the primary architects of the administrative state, James Landis, gave us the blueprint himself.

As noted, Landis was an influential adviser to Franklin Roosevelt during the New Deal. He served on the Federal Trade Commission and as chairman of the Securities and Exchange Commission after it was created during the New Deal. In a short book called *The Administrative Process,* which praises the administrative state effusively, Landis had to wrestle with the problem of how to overcome the then-entrenched barrier of delegating legislative power. He identified two options, both derived from English administrative law, that in today's situation would act to restrain delegation and improve congressional responsibility:

1. Provide a period of time before agency rules become effective, during which time Congress can strike them down, or

2. Do not allow agency rules to become effective unless Congress affirmatively approves them.[70]

These approaches would allow for regulation and for agencies to suggest regulations to Congress for adoption but would still ensure that some representative body was responsible for enacting them.

The first option—that proposed rules would be automatically adopted unless Congress actively revokes them—is the approach adopted by the Congressional Review Act

68. Morris P. Fiorina, *Congress: Keystone of the Washington Establishment,* 2nd ed. (New Haven: Yale University Press, 1989).

69. For a nice overview, see Robert E. Moffit, "How to Roll Back the Administrative State," Heritage Foundation *Center for Policy Innovation Discussion Paper* No. 1, February 17, 2011, http://www.heritage.org/research/reports/2011/02/how-to-roll-back-the-administrative-state, and "Why Congress Must Confront the Administrative State," Heritage Foundation *Center for Policy Innovation Lecture No. 5,* April 2, 2012, http://www.heritage.org/research/reports/2012/04/why-congress-must-confront-the-administrative-state.

70. Landis, *The Administrative Process,* p. 77.

(CRA), a law that is still in effect today, although rarely used.[71] The CRA allows Congress to overturn any proposed "major" rule, defined as any rule that has an annual economic impact of over $100 million when originally promulgated. Unfortunately, there is a reason that the CRA is rarely used: Resolutions overturning agency rules must be passed by both houses of Congress and signed by the President, a cumbersome process that stacks the deck against rescinding any rules at all.[72]

More interesting is the second option, requiring Congress to approve any proposed rule before it can be enacted. This is the central idea behind the Regulations from the Executive in Need of Scrutiny (REINS) Act, passed by the House of Representatives in December 2011 before stalling in the Senate. The REINS Act would have required Congress to affirmatively approve a major rule before it became binding law.[73]

Both of these approaches would help to restore the responsibility of Congress in passing laws, but only the second option, contained in the REINS Act, would be effective because under the first approach, rules and regulations could still become law without Congress lifting a finger. Requiring Congress to approve laws passed by agencies and departments in the form of rules would help to restore accountability and constitutionality to a large portion of the administrative state.

Again, it should be stressed that under both of these approaches, administrative agencies could still be important elements of our government. They would be charged with the investigation, prosecution, and enforcement of rules voted on by elected representatives in Congress. They would even have the ability to propose laws for Congress's consideration. The expertise of the agencies would still be important elements of our national government. But responsibility for lawmaking would rest in Congress, which is where that power is constitutionally vested.

REQUIRING CONGRESS TO APPROVE LAWS PASSED BY AGENCIES AND DEPARTMENTS IN THE FORM OF RULES WOULD HELP TO RESTORE ACCOUNTABILITY AND CONSTITUTIONALITY TO A LARGE PORTION OF THE ADMINISTRATIVE STATE.

Another possibility for congressional reform would combine two important ideas—congressional accountability and periodic review of existing rules—in a single concept: the regular review of administrative rules by Congress.[74] Many of these rules "interpret" vague standards in legislation passed by Congress, such as the responsibility to regulate "air pollution" or to ensure "safe or healthful" working conditions. Regularly reviewing these rules would allow Congress to clarify the vague standards in the legislation, correcting bureaucratic overreach and taking responsibility for the laws that bind citizens and businesses. By taking this approach, Congress could simply reverse any rule by codifying it or by codifying a different rule in the law itself. Existing rules that are already in the Code of Federal Regulations could be brought to Congress for a real vote by our elected representatives.

Congress should therefore consider establishing a regular procedure, and perhaps a new standing committee or Office of Regulatory Review, charged with the periodic review of rules for the sake of codifying them by amending the agencies' and departments' organic statutes (the statutes that create and/or grant power to agencies and departments). This would serve the dual purposes of having Congress take responsibility for passing laws and having regular review of regulations that may be outdated.

Today, Members of Congress have strong incentives to avoid taking responsibility for lawmaking. Making law inevitably angers some of a Member's constituents while pleasing others. Thus, lawmaking is a risk-reward proposition: Although the Member might be rewarded by constituents for his or her vote on a particular bill, there is a high

71. As of this writing, the CRA has been used to overturn only one rule since its passage in 1996: an OSHA rule pertaining to ergonomics. The Senate disapproved an FCC rule in 2003 and a USDA rule in 2005, and neither was acted upon in the House.

72. The CRA is designed to act in this manner primarily because of the Supreme Court's decision in *INS v. Chadha,* 462 U.S. 919 (1983), which invalidated the one-chamber legislative veto on the grounds that it violated the Presentment Clause of the Constitution, Article I, Section 7.

73. James L. Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo* No. 3394, October 13, 2011, http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation.

74. In fact, this is already required by existing law: § 610 of the Regulatory Flexibility Act of 2000. See Jeffrey A. Rosen, testimony before the Subcommittee on Courts, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, February 28, 2011, p. 14, http://judiciary.house.gov/hearings/pdf/Rosen02282011.pdf (accessed 8/13/2012). See also Moffit, "Why Congress Must Confront the Administrative State."

likelihood of losing constituents' support because of that same vote.

As a result, Members of Congress like to delegate lawmaking power to an agency or department, let it take the heat for angering citizens, and ride to the rescue by conducting "casework," or the process of helping a constituent when the constituent is aggrieved by said agency or department.[75] By doing so, Congress abdicates responsibility for making the law in hopes of gaining credit for helping particular constituents.

One possible way to adjust these perverse incentives is to consider establishing an alternative process, such as a national ombudsman to assist citizens who have been adversely affected by rules and regulations. The objective would be to remove the positive benefits that Members of Congress receive by delegating legislative power and then using casework to gain favor with particular constituents.

There are other immediate measures that Congress can take to restore sanity to the administrative process. Today's agencies and departments routinely hand out exemptions from the rules they adopt to benefit regulated entities. This is fundamentally contrary to the principles of the rule of law and representation and encourages political cronyism. Responding to the arguments of Anti-Federalists that the House of Representatives would become aristocratic and detached from the concerns of average citizens, James Madison wrote in *Federalist* No. 57 that representatives would be true to the public interest because "they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society." The spiritedness of the American people would revolt at any attempt by lawmakers to make "legal discriminations in favor of themselves and a particular class of the society."[76]

TODAY'S AGENCIES AND DEPARTMENTS ROUTINELY HAND OUT EXEMPTIONS FROM THE RULES THEY ADOPT TO BENEFIT REGULATED ENTITIES.

Today, however, such legal discriminations in favor of preferred constituents are commonplace.[77] Congress can immediately prohibit agencies and departments from making such discriminations by requiring that rules apply equally to all.

Further, to the extent that Congress finds it necessary to grant agencies and departments the power to make legislative rules, it should consider expanding the use of the formal rulemaking process.[78] This was established in 1946 by the Administrative Procedure Act (APA), a significant piece of legislation that was intended to make sure that agencies followed the rule of law and due process when making rules.

Formal rulemaking requires an agency to provide a formal, public, trial-type hearing, with opportunity for interested parties to present evidence and expert witnesses, before an agency can promulgate a rule. Thus, it ensures that agencies have to follow transparent procedures that protect regulated parties and provide some modicum of accountability in rulemaking. By contrast, informal rulemaking merely requires the agencies to follow three steps: Issue a notice of proposed rulemaking (NPR), provide opportunity for the public submission of comments to the agency, and issue a rule with a general statement of the basis and purpose of the rule.

The APA was adopted with the expectation that formal rulemaking procedures would be frequently employed, but subsequent decisions by the Supreme Court have largely eliminated the category of formal rulemaking.[79] Congress nevertheless retains the authority to define acceptable administrative procedures.

Formal rulemaking is no panacea, of course, nor is it useful for all types of proceedings. The typical rulemaking proceeding involves a policy determination of general applicability rather than a specific determination of the rights of specific individuals. There are no individually identifiable "parties" in these cases. And such requirements as oral cross-examination of witnesses may not

75. This paragraph and the previous paragraph rely heavily on the analysis in Fiorina, *Congress: Keystone of the Washington Establishment,* pp. 38–47.

76. Madison, *Federalist* No. 57, pp. 386–387.

77. The exemptions to the Patient Protection and Affordable Care Act now number over one thousand. See *supra,* note 4.

78. See Gary S. Lawson, "Reviving Formal Rulemaking: Openness and Accountability for Obamacare," Heritage Foundation *Backgrounder* No. 2585, July 25, 2011 http://www.heritage.org/research/reports/2011/07/reviving-formal-rulemaking-openness-and-accountability-for-obamacare.

79. The relevant case here is *U.S. v. Florida East Coast Railway,* 410 U.S. 224 (1973). In the years since this case was decided, most agency action has shifted to informal rulemaking and the courts have grafted additional procedural requirements onto informal rulemaking, making the process resemble that of formal rulemaking. This has continued despite the Supreme Court's admonition to the contrary in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978)

always be helpful in such contexts. The general problem is that these rulemakings are exercises in a legislative rather than a judicial function, which is why the primary remedy in such cases is to restore and reinvigorate Congress's legislative and oversight role in controlling and restraining the regulatory creation and implementation process.

A final important issue for congressional consideration is restoration of the traditional judicial process. The administrative process for adjudicating cases is fundamentally at odds with the rule of law and leaves citizens and regulated entities at the mercy of the government. These kinds of decisions could be transferred back by Congress to normal, independent courts governed by Article III of the Constitution. The public would once again have the protections of the traditional judicial process. Merely having an Article III court available for appeal after exhausting the administrative tribunals is not a sufficient solution, since Article III courts tend to defer to the decisions of these tribunals, and the appeals process is costly for both citizens and regulated entities.

2. The President's Role: Restoring the Unitary Executive. As noted, the expansion of the administrative state in particular has not led to an expansion either of the power of the President in general or of the executive branch in relation to the administrative state. This is because the administrative state is a "fourth branch" of government in which the three types of governmental powers—not simply the executive power—are consolidated and exercised.

While the President now has control over a few bureaucrats within some agencies and departments, he still has little control over most administrative personnel and little oversight of the day-to-day activities of administrative agencies. The President can appoint his Cabinet and some members of some agencies, particularly the heads of executive agencies and commissioners of independent regulatory commissions when their terms are complete, but most agency personnel—in fact, most federal bureaucrats—remain in power regardless of who occupies the Oval Office.

The inability of Presidents to control bureaucrats has frustrated Democratic and Republican Administrations alike over the past several decades. Harry Truman sympathized with the plight of his successor, Dwight Eisenhower, as the supposed "chief executive" under the Constitution: "He will sit here and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the army."[80] Truman knew this would happen from his own experience. He complained, "I thought I was the President, but when it comes to these bureaucrats, I can't do a damn thing."[81]

The bureaucracy was so hostile to Richard Nixon that it even captured the loyalty of his *political* appointees. About his own appointees to the executive departments, Nixon's aide John Ehrlichman said, "We only see them at the annual White House Christmas party; they go off and marry the natives."[82]

The point is that even though these agencies *appear* to some observers to be part of the executive branch, they are not subject to the direction of the person who is given the executive power in the Constitution: the President. If anything, the President has become *weaker* as a result of the creation of the administrative state.[83]

EVEN THOUGH THESE AGENCIES *APPEAR* TO SOME OBSERVERS TO BE PART OF THE EXECUTIVE BRANCH, THEY ARE NOT SUBJECT TO THE DIRECTION OF THE PERSON WHO IS GIVEN THE EXECUTIVE POWER IN THE CONSTITUTION: THE PRESIDENT.

Quite reasonably, Presidents have responded by trying to recapture control of the bureaucracy. The attempt of Presidents to control the administrative state is, again, typical of Republicans and Democrats alike.

Much has been made of the use of so-called czars to consolidate control of the bureaucracy in the White

80. Quoted in Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: The Free Press, 1991), p. 10.

81. Quoted in Richard P. Nathan, *The Administrative Presidency* (New York: John Wiley & Sons, 1983), p. 2.

82. Ibid., p. 30.

83. It should be noted that some Presidents are more effective than others at gaining control of the bureaucracy. According to now-U.S. Supreme Court Justice Elena Kagan, President William Clinton was remarkably adept at controlling some decisions made by certain agencies and departments. See Elena Kagan, "Presidential Administration," *Harvard Law Review,* Vol. 114 (2001), pp. 2245–2383. Of course, Presidents have some control over the bureaucracy, but the key point is that the President is not solely or even chiefly responsible for the policy decisions of most federal agencies and departments, despite the fact that citizens often attribute these decisions to the President's "Administration."

House.[84] These "czars" are merely White House advisers who are trying to expand the President's influence in administrative policymaking. Rather than being located in the executive departments, where they interact more with career bureaucrats than the President's confidants, these "czars" are part of the White House office and interact more regularly with the President and his advisers. Thus, it is easier for the President to direct White House staff than to direct his political appointees in the executive departments.

Because President Barack Obama has made use of these advisers, many conservative critics have inferred that this practice should be opposed. But when one considers the two possible alternatives—either the President, an elected official accountable to the people, has more control over bureaucratic decision making or the bureaucracy is beholden to congressional oversight that occurs largely behind the scenes—the use of these advisers appears very different.

In short, these advisers, many of whom are in positions that require Senate confirmation, enhance the accountability of the national bureaucracy by making an elected official directly responsible for its activities. We can hold bureaucrats accountable through the President, but only if the President actually influences what the bureaucrats are doing. For this reason their use may not be as antagonistic to constitutional principles as the name implies.[85]

There are other actions that the President can take to make the national bureaucracy more accountable to the people, and Congress can enact laws to support these actions. One possibility is for Congress to give authority to the President to remove administrative officials more easily.

IF THE PRESIDENT COULD DIRECTLY ORDER AGENCIES TO FOLLOW HIS COMMANDS, IT WOULD REINFORCE ACCOUNTABILITY, PROVIDE INCENTIVES FOR CONGRESS TO MAKE THE LAWS ITSELF, AND CLARIFY IN THE PUBLIC MIND WHERE THESE AGENCIES ARE LOCATED IN OUR CONSTITUTIONAL STRUCTURE.

According to the Constitution, Congress has the power to vest the appointments of "Inferior Officers" in the hands of the President, the courts of law, or the heads of departments (Article II, Section 2). But since the rise of the administrative state, most federal personnel are selected through the civil service system, in which "open, competitive examinations for testing applicants for appointment" are employed.[86] At present, most career bureaucrats are selected by an assembled examination, which is a written test, or by an unassembled examination, which is also a merit-based civil service system.[87]

Once a person is appointed through the civil service system, he or she becomes a career bureaucrat relatively immune from the oversight of the President. The President's relatively few political appointees are not always able to change the way the entrenched career bureaucracy has done things. Thus, even if a President is elected on a platform of regulatory change and reform and thus carries the will of the people with him to the agencies, it is difficult for the public's views to be translated into agency policy. Congress can change how agency personnel are selected by placing more power in the hands of the President to appoint and remove agency personnel, thereby enhancing the accountability of agencies.

Alternatively, Congress can give the President the power to intervene in particular decisions, overturning agency and departmental actions with which he disagrees. This alternative to granting appointment and removal powers to the President would achieve largely the same result: The accountability of administrative decisions would be enhanced, and the views of the public could be translated into policy in line with the way the Framers intended the political process to work.

In fact, the President could try to exercise this power even *absent* Congress granting it to him. The President could simply direct an agency or a department to change its decision based on his political

84. For a helpful explanation of the issues surrounding the use of White House "czars," see Matthew Spalding, "Examining the History and Legality of Executive Branch Czars," testimony before the Committee on the Judiciary, U.S. Senate, October 6, 2009, http://www.heritage.org/research/testimony/examining-the-history-and-legality-of-executive-branch-czars.

85. Ibid.

86. Federal Regulation Study Team, *Federal Energy Regulation: An Organizational Study* (Washington: U.S. Government Printing Office, April 1974), Appendix D, pp. D1–D2, quoted in Donald F. Kettl and James W. Fesler, *The Politics of the Administrative Process,* 3rd ed. (Washington: CQ Press, 2005), p. 174.

87. See Kettl and Fesler, *The Politics of the Administrative Process,* pp. 173–175. An assembled examination consists of a written or performance test where all applicants for a position assemble in the same place to take the exam. An unassembled examination does not require a test. Applicants are rated on objective factors such as education, experience, and past achievements.

priorities and his power as chief executive. Presidents have done this in the past—most notably, Andrew Jackson with regard to the national bank. This would provoke the constitutional question: Are these agencies accountable to the President or not?[88] If the answer to that question turned out to be "no," this would provoke a constitutional challenge to the status of agencies. If they are not accountable to the President, where in our constitutional structure *are* they accountable?

An additional benefit of these reforms is that they bring the issues of the administrative state to the forefront of the public debate. If the powers of the agencies are indeed executive, as many defenders of the administrative state wish to argue, then why is the President unable to control the people charged with exercising these powers or to change agency decisions with which he disagrees? If the President could directly order agencies to follow his commands, it would reinforce accountability; provide incentives for Congress to make the laws itself (since the legislative power it delegates would go into the hands of the President, a rival branch of government); and clarify in the public mind where these agencies are located in our constitutional structure.

3. The Judicial Role. When thinking of reforming the administrative state, we should not overlook the potential role the judicial branch can play. By law, Congress defines the scope of judicial review of administrative decisions. Ever since the administrative state was created, the scope of judicial review of administrative decisions has been highly limited. While the courts have adopted a deferential position in the face of agency actions, they in fact have an important role to play in preserving the rule of law and the rights of individuals in the face of potentially arbitrary and capricious actions.

Congress should therefore consider revising the law to create more rigorous standards of judicial review of administrative decisions. Once parties affected by administrative decisions finally navigate the internal agency appeals process and reach an independent judge, Congress could ensure that the judge would review the decision rigorously. In other words, they would not give the agency or department the benefit of the doubt when its decision is under review in court.

In particular, Congress should ensure that agencies' and departments' interpretations of their own laws are heavily scrutinized by reviewing courts. This would subject the administrative state to the check of judicial review, restoring some semblance of separation of powers. Judicial scrutiny of administrative policymaking has been on the rise over the past few decades, but it has occurred largely on the initiative of the judges themselves through expansive interpretation of certain provisions of the Administrative Procedure Act.

Congress could clarify this matter and provide predictability for regulated citizens by establishing the proper scope of judicial review of rulemaking. The easiest way to do this would be to revise the Administrative Procedure Act to reiterate that reviewing courts can determine all issues of legal interpretation without any deference to the agency or department under review.[89]

CONGRESS SHOULD ENSURE THAT AGENCIES' AND DEPARTMENTS' INTERPRETATIONS OF THEIR OWN LAWS ARE HEAVILY SCRUTINIZED BY REVIEWING COURTS. THIS WOULD SUBJECT THE ADMINISTRATIVE STATE TO THE CHECK OF JUDICIAL REVIEW, RESTORING SOME SEMBLANCE OF SEPARATION OF POWERS.

Congress could apply such standards for judicial review either across all agencies and departments or only for certain types of administrative actions such as informal rulemaking, interpretative rulemaking, and issuance of policy statements and guidance documents. These are less formal ways that agencies and departments craft rules that have the force of law. For instance, agencies will often issue vague rules and then explain those rules to regulated parties by issuing memos and opinion letters to them. Congress can require that courts reviewing such informal decisions by agencies be subject to expedited judicial review, meaning that affected citizens could go to an independent court without exhausting internal agency appeals.

If agencies and departments know that there are consequences (receiving less deference from a reviewing

88. For this to work, of course, the decision the President tries to reverse would have to be a discretionary duty rather than something that Congress makes mandatory in the law. If Congress passes a law creating mandatory duties, there is no legal discretion to refuse to execute the law.

89. The Administrative Procedure Act already seems to provide for this nondeferential review of agency statutory interpretations (see 5 U.S.C. §706: "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions…."), but the Supreme Court has determined under the so-called *Chevron* doctrine that any reasonable agency interpretation of a statute will receive deference from reviewing courts.

court) for using informal procedures such as opinion letters, guidance documents, and interpretative rules to make policy, they will have greater incentives to employ the normal procedures for rulemaking that are anticipated by the Administrative Procedure Act.

If there is a concern that judges are not sufficiently expert to review administrative policymaking, specialized courts could be established in the densest and most complex areas of policymaking to enhance judicial expertise. Congress, for example, gave the Federal Circuit specialized jurisdiction over patents, trademarks, and international trade disputes. These reforms would produce two potentially beneficial effects.

1. Greater judicial scrutiny of agencies would protect the public from the harmful excesses of the administrative state.

2. These reforms could be used as incentives to encourage agencies and departments to follow adequate procedures before making decisions that affect citizens and regulated companies. If Congress places higher judicial scrutiny on less formal procedures such as the issuance of guidance documents, agencies and departments have to pay a penalty for not following the formal processes that promote accountability and protect the public.

These reforms would therefore go hand in hand with Congress's restoration of the formal rulemaking process originally envisioned by the Administrative Procedure Act. Adjusting the scope of judicial review of agencies in these ways creates procedural protections from arbitrary decisions and checks administrative action by subjecting it to judicial oversight.

In summary, the courts can help to check the administrative state by embracing their traditional function: reviewing decisions made by administrators to ensure that those decisions are consistent with the rule of law and due process. Congress should, in the first place, restore the function of adjudication to the courts as much as possible and, second, define the courts' scope of review of administrative decisions to restore some semblance of checks on the administrative state.

The constitutional crisis provoked by the administrative state demands a thoughtful, principled, but also practical response. The ideal solution is for Congress to make the laws itself rather than delegating that power to agencies and departments. But there are other options for improving the situation. Enhancing presidential control of the administrative state and expanding the scope of judicial review of at least some administrative decisions while eliminating waivers and transferring the power of adjudication to independent courts would begin to rein in the administrative state so that the constitutional rights of the public are protected.

Conclusion

The administrative state presents us with a fundamental choice: Do we want to live under a government of laws, or are we going to continue our slide toward a government of men? That is, do we want a government that rules by the consent of the governed through elections and representation, or will we continue to delegate our power of self-government to unelected and unaccountable experts in faraway places so that they can administer our lives for us?

The argument of this report is that the administrative state has caused a constitutional crisis that must be confronted. Today's agencies violate the separation of powers by combining legislative, executive, and judicial functions in the same hands, and they violate republicanism by vesting those powers in unelected and unaccountable bureaucracies. However, we can develop a constitutional strategy to rein in the administrative state and subject it to the constitutional protections devised by our Founders. We have an opportunity to achieve something great: the restoration of our constitutional principles and preservation of what makes our country so great.

Reforming the administrative state is not a utopian project and should not be an unpopular political aim. In fact, the administrative state is an assault on constitutional principles—government by consent, the separation of powers, and the rights of individuals—that both liberals and conservatives hold dear. The rise of unchecked bureaucracy that exercises arbitrary control over citizens should be alarming for *anyone* who holds these principles dear.

Reforming the administrative state does not require a return to laissez-faire, unregulated capitalism, nor does it entail the dismantling of the federal government or federal administrative agencies. The legitimate need for regulation and administration can and must be made consistent with our constitutional principles.

The key to reform is that it be grounded in a proper understanding of these principles, not in the hope of immediate short-term gain or narrow self-interest. If we begin from constitutional principles and can communicate those principles and their relevance to the public in a clear manner, the reforms envisioned in this report are not too far from our grasp. It is high time that Americans work together to forge an alternative to the administrative state so that we preserve our constitutional principles for future generations.

Suggestions for Further Reading

Although the administrative state represents our new governing reality, very little has been written about it and its relationship to our constitutional principles. There are, of course, many books on bureaucracy, but most focus on how the bureaucracy works and how certain policies were made by bureaucracies. They fail to address the constitutional problems raised by the modern administrative state.

More recently, however, scholars have started drawing attention to these core constitutional issues. What follows are recommendations for further reading on the theory behind the administrative state and the different ways in which it threatens our constitutional principles.

I begin with some shorter readings that are also published by The Heritage Foundation. Two essays in its *First Principles* series are especially noteworthy:

- Ronald J. Pestritto's "The Birth of the Administrative State: Where It Came From and What It Means for Limited Government" is an excellent introduction to the major Progressive theorists who envisioned the administrative state in the early 20th century and their contempt for the Constitution's checks that stood in the way of modern bureaucracy.

- Gary S. Lawson's "Limited Government, Unlimited Administration: Is It Possible to Restore Constitutionalism?" explains how the modern administrative state has done great damage to the Constitution and also ponders how we might be able to restore constitutional government in the wake of the administrative state. (Lawson's piece is based on a must-read law review article from 1994 titled "The Rise and Rise of the Administrative State.")

Robert Moffit has also written an instructive paper for Heritage, "How to Roll Back the Administrative State," that is required reading for anyone who wants to understand the positive steps we can take, here and now, to restore constitutionalism. One final, shorter reading is worth noting: Thomas G. West and Douglas Jeffrey's *The Rise and Fall of Constitutional Government in America* (2004), published by the Claremont Institute.

The best explanations of the theory of the administrative state are not found in book-length treatments, but in shorter essays, many of which are contained in edited volumes: Thomas G. West's chapter, "Progressivism and the Transformation of American Government," and John Marini's chapter, "Progressivism, Modern Political Science, and the Transformation of American Constitutionalism," in *The Progressive Revolution in Politics and Political Science* (2005), edited by Marini and Ken Masugi, are excellent resources.

John Marini's book *The Politics of Budget Control* (1992) is also an excellent resource on the political battles that have resulted from the rise of the administrative state. Friedrich Hayek, the great classical liberal thinker, was actually the first to see clearly the problem of the administrative state. The second part of his superb *The Constitution of Liberty* (1970) is dedicated to the concept of the rule of law, and Hayek explains how the administrative state has undermined that central principle.

Some excellent book-length treatments of the administrative state do exist. Three of the best are:

- James Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978);

- Robert Lorch, *Democratic Process and Administrative Law* (1980); and

- Theodore Lowi, *The End of Liberalism* (1979, 2nd edition).

Each of these books takes a slightly different tack, but they are all superb. Freedman focuses on the periodic outbursts against the administrative state by those who are still wedded to the Constitution. Lorch writes a very accessible little book that acknowledges clearly that the modern administrative state has basically destroyed the separation of powers (though he does not conclude from this that the administrative state is illegitimate). Lowi's book is more polemical and focuses on the delegation of legislative power to agencies and the expansion of government power that has resulted from such delegations.

The best book on the delegation of legislative power, condemning Congress, providing examples of delegations, and also issuing a prescription for the problem, is David Schoenbrod's *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1995). Schoenbrod rightly focuses on Congress as the primary culprit.

But why is Congress so eager to give away its power? Isn't

that against its interest? Morris P. Fiorina's indispensible book *Congress: Keystone of the Washington Establishment* (1989) explains why Congress actually benefits from delegating its power to agencies. Congress gives away responsibility for the harmful consequences of regulation, taking credit for its benefits and passing the responsibility for the costs to agencies. This explains, among other things, Congress's sky-high re-election rates in an era when Congress is universally loathed. Fiorina's book is absolutely essential.

Some books try to defend the constitutionality of the administrative state. John Rohr's *To Run a Constitution: The Legitimacy of the Administrative State* (1986) is the best-known effort. A recent book along the same lines is Eric Posner and Adrian Vermeule's *The Executive Unbound: After the Madisonian Constitution* (2011). However, whereas Rohr attempts to square the administrative state with the Constitution, Posner and Vermeule admit that there is a tension between the Constitution and the administrative state and express thanks that America chose the administrative state over the Constitution. It is good to be acquainted with these defenses of the administrative state, as any attempt to roll back this fourth branch of government will surely meet their arguments along the way.

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