

LIBERTY REQUIRES ACCOUNTABILITY: CHECKING DELEGATIONS TO INDEPENDENT AGENCIES

INTRODUCTION

“Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable.”¹ By restricting Congress’s ability to grant broad legislative power to the President or his unelected agents, the nondelegation doctrine holds that legislative power must remain where the Constitution places it—in Congress. The doctrine is both textual and structural, based on the Vesting Clause in Article I² and the separation of powers interests served by the requirement of bicameralism and presentment.³ Beneath these interests lies a deeper foundational principle: The people must retain power over those who govern society; this is possible only if the power to make rules is restricted to the parts of the government that are selected and removed by the people.⁴

Promoting political accountability is a central feature of American political thought dating back to the Founding period, find-

1. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935); *see also* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers.”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”).

2. “All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1, cl. 1.

3. U.S. CONST. art., I § 1, cl. 1; U.S. CONST. art. I, § 7.

4. As Justice Alito recently noted, it is “a vital constitutional principal [that] Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.” *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). *See also* *Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (“[The nondelegation doctrine] ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”); *see generally* *Panama Refining Co. v. Ryan*, 293 U.S. 288 (1935).

ing expression in the Declaration of Independence, *The Federalist* and the works that influenced the founders. The Court's permissive approach to delegation allows Congress to transfer political accountability for the details of regulations to the executive. The Court's acceptance of strict limits on the President's removal power, however, has severely curtailed the political accountability of independent agencies through the executive. As a result, independent agencies comprising a large portion of the federal regulatory state operate in isolation, severed from any close link to the people. This Note argues that the isolation of those agencies through removal protection renders nondelegation concerns particularly acute and suggests that, in combination,⁵ delegated rulemaking authority and for-cause removal protections unconstitutionally undermine political accountability and violate the separation of powers.⁶

Federal courts have been sporadic and uncertain in defending political accountability. The Supreme Court has defended the people's powers of election,⁷ but it has done little to ensure that those elected by the people are the principle architects of government policy. The nondelegation doctrine, addressing precisely this concern, has been less than rigorously enforced. After a one-two nondelegation punch in 1935,⁸ the doctrine has disappeared almost entirely from our jurisprudence.⁹

5. Both precedents—the Court's acceptance of broad delegations and removal protections—are constitutionally problematic on their own, but in combination they raise even more troubling questions about political accountability. This Note will focus on the two in combination.

6. Critics of independent agencies have regularly acknowledged the threat that removal limitations pose to the separation of powers and have shown how removal protections undermine political accountability. See REPORT OF COMMISSION ON LAW AND THE ECONOMY: FEDERAL REGULATION: ROADS TO REFORM (1979); Steven Calabresi & Christopher Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 116 (2009). These criticisms generally have not considered the way that questions of constitutionality under the nondelegation doctrine are heightened as a result of removal protections. In combination, rulemaking authority and removal protections threaten the constitutional system more than removal protections alone.

7. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the Voting Rights Act of 1965, 79 Stat. 437); *Reynolds v. Sims*, 377 U.S. 533 (1964) (declaring "one man, one vote" as a constitutionally-protected principle); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (extending "one man, one vote" to congressional redistricting).

8. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. at 288.

9. As Professor Sunstein eloquently puts it, the doctrine "has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). We are now up to 226 bad years.

The death of nondelegation has shifted the bulk of the government's business from Congress to federal regulatory agencies. Every year, the growth of Statutes at Large is dwarfed by the expansion of the Federal Register. America is now a nation governed largely by the duly appointed administrators of the people rather than the duly elected representatives of the people. While the President retains direct oversight of and at-will dismissal power over many agency heads, a growing number of federal officials may only be removed by the President for cause. Agency heads insulated from presidential removal govern many of the most important federal bodies with regulatory power over immense stretches of the American citizenry.¹⁰ Removal power restrictions have the apparent virtue of insulating agency actions from untoward political influence, but they also insulate agency actions from political accountability. The Supreme Court has

10. These include, among others: the Consumer Product Safety Commission ("Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause." 15 U.S.C. § 2053(a)); the Federal Energy Regulatory Commission ("may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office" 42 U.S.C. § 7171(b)(1)); the Federal Reserve Board ("Each member shall hold office for a term of fourteen years from the expiration of his predecessor, unless sooner removed for cause by the President" 12 U.S.C. § 242); the Federal Trade Commission ("inefficiency, neglect of duty, or malfeasance in office" 15 U.S.C. § 41); the Federal Mine Safety and Health Review Commission ("inefficiency, neglect of duty, or malfeasance in office" 30 U.S.C. § 823(b)(1)); the National Labor Relations Board ("neglect of duty or malfeasance in office" 29 U.S.C. § 153(a)); the National Transportation Safety Board ("inefficiency, neglect of duty, or malfeasance in office" 49 U.S.C. § 1111(c)); the Nuclear Regulatory Commission ("inefficiency, neglect of duty, or malfeasance in office" 42 U.S.C. § 5841(e)); the Occupational Safety and Health Review Commission ("inefficiency, neglect of duty, or malfeasance in office" 29 U.S.C. § 661 (b)); the Office of Special Counsel ("inefficiency, neglect of duty, or malfeasance in office" 5 U.S.C. § 1211 (b)); the Social Security Administration ("neglect of duty, or malfeasance in office" 42 U.S.C. § 902(a)(3)); the United States Sentencing Commission ("neglect of duty, or malfeasance in office or for other good cause shown" 28 U.S.C. § 991(a)); the Consumer Financial Protection Bureau ("inefficiency, neglect of duty, or malfeasance in office" 12 U.S.C. § 5491(c)(3)). A vast array of other federal agencies have the appearance of independence and have directors or commissioners who, by common practice, are not removable by the President despite there being no statutory text explicitly limiting the President's removal power. *See e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010) (noting that all parties and the Court agree that SEC Commissioners enjoy "inefficiency, neglect of duty, or malfeasance in office" removal protection despite the absence of statutory language to that effect). Although the culture of independence surrounding those agencies raises problems of political accountability similar to those with statutory limitations of removability, this piece will concentrate on the latter category, which enjoys the Court's explicit acceptance of insulation from political accountability. *See Morrison v. Olson*, 487 U.S. 654 (1988).

broadly accepted Congress's power to impose statutory limitations on the President's power to remove public officials.¹¹ While the Court has signaled some willingness to restrict removal limitations,¹² it has not yet returned to the nearly unlimited removal authority declared by the first case on the subject.¹³

This Note argues that Congress's and the President's decision to vest policymaking authority in independent agencies unconstitutionally deprives the people of their ability to hold government to account and violates the structure of separated and enumerated powers created by Articles I and II. The first Section will explore political accountability as a concept, locating its roots in the Founding before exploring the particular problems of political unaccountability raised by independent agencies. The second Section will show that the Court's less-than-rigorous nondelegation doctrine has severed the ties of political accountability running from the people through Congress to independent agencies. The third section will detail how the Court's removal power jurisprudence eliminates the ties of political accountability running from the people through the President to independent agencies.¹⁴

The Note will close by considering several possible solutions to the crisis of accountability. First, we will examine whether a higher standard than a mere "intelligible principle" should be required for permissible delegations. Next, we will consider whether the President should test the boundaries of removal protections by arguing that a consistent pattern of actions contrary to the President's policy preferences constitutes cause for removal. The Note will close by suggesting that Congress and

11. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

12. See *Free Enter. Fund*, 561 U.S. 477 (declaring unconstitutional the double insulation of commissioners of the PCAOB who could be removed only for cause by SEC commissioners who in turn could be removed only for "inefficiency, neglect of duty, or malfeasance in office" by the President).

13. *Myers v. United States*, 272 U.S. 52 (1926).

14. Chief Justice Roberts, in *Free Enterprise Fund*, put the danger of the abdication of political accountability at the heart of the Court's separation of powers reasoning. 561 U.S. at 497-98 ("The diffusion of power carries with it a diffusion of accountability. The people do not vote for the Officers of the United States. They instead look to the President to guide the assistants or deputies . . . subject to his superintendence. Without a clear and effective chain of command, the public cannot determine on whom the blame or punishment of a pernicious measure, or series of measures ought really to fall.") (citations and internal quotation marks omitted).

the President should not delegate policymaking power, that is, the power to promulgate regulations or to conduct adjudications before administrative law judges or agency commissioners, to an agency whose head is protected from at will removal. They may give an agency policymaking power, or they may insulate the agency head from removal, but they should not do both. Under the proposed doctrine, independent agencies may continue to seek civil or criminal enforcement through proceedings in federal district courts but could not use the mechanisms of sections 553, 554, 556, and 557 of the Administrative Procedure Act.¹⁵

I. POLITICAL ACCOUNTABILITY IN THE AMERICAN CONSTITUTIONAL TRADITION

Political accountability lies at the very heart of the republican government envisioned by the Founding generation and carried into practice by the Constitution. The Founders argued that in order for republican governance to succeed, the governors must be selected by the governed and held to account by them.¹⁶ In such a system, the people could effect their political will by electing those who promised to support favored policies and replacing those members of the government who imposed laws that the people did not support.

For the purposes of this Note, “political accountability” will be used to describe the general proposition that those who make and implement the laws governing society should be responsive to the preferences of the people.¹⁷ This general proposition divides into two distinct and equally important halves. The first, which we will call positive accountability, requires that the people are able to put into power policymakers who will implement the preferred policies of the people. The second, which we will call negative accountability, requires that people are able to associate the policies enacted by the government with particular members of the government and to ascribe the associated praise or blame for that policy to the rel-

15. 5 U.S.C. §§ 553-54, 556-57 (2012).

16. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

17. This is not to suggest that political accountability means governance by poll or initiative. Rather, it is to say that, at a broad level, the people are able to realize their preferred policies through the political processes.

evant member of government. The former is the creative aspect of political accountability. It allows majorities to create the laws they desire in society.¹⁸ The latter is the critical or destructive aspect of political accountability. It allows majorities to punish and replace lawmakers who put in place unpopular or unsuccessful policies.

The value of political accountability deeply informed the Founding generation. The Declaration of Independence listed among its grievances a number of royal actions undermining both the positive and negative aspects of political accountability. The drafters protested King George's denial of "the right of Representation in the Legislature, a Right inestimable to [the American people]"¹⁹; his dissolution of legislatures, refusal to assent to their laws, and his calling of legislative sessions in remote or unusual places²⁰; and his intent to "subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation."²¹ At its most fundamental level, the American Revolution was aimed at removing the barriers between the rulers and the ruled and enabling the people to govern themselves.²²

A decade after the Revolution, the ratification debates focused, in part, on whether the President and members of Con-

18. In our modern political conversation, majorities are presumed to act with an interest in serving, in the best case, an extremely shortsighted self-interest, and in the worst case, the worst sort of discriminatory tyranny. This Note takes a generally more positive view of majorities and of majority rule. The basic premise of democratic republican government, which exists in this country and other Western free states, is that the majority ought to rule. There are certain bounds that are deliberately erected to restrain the majority—lines over which the majority cannot stray, or structures designed to dilute or delay the will of the majority—but the basic premise is that the most just system is to allow the majority to rule.

19. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

20. THE DECLARATION OF INDEPENDENCE para. 3, 4, 6, 7, 8, 24 (U.S. 1776).

21. All of which undermined positive political accountability by destroying the power of the American people to select their own legislators. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

22. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 18, 57-63, 447 (1969); Richard Buel, Jr., *Democracy and the American Revolution: A Frame of Reference*, 21 WM. & MARY Q. 165, 168-76 (1964); THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961) ("The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest our political experiments on the capacity of mankind for self-government.").

gress were sufficiently accountable to the people.²³ Commentators on both sides debated whether institutions like the Senate,²⁴ the Electoral College,²⁵ and the apportionment of congressional districts²⁶ unduly restrained the ability of the majority to make their will heard. Opponents of the new Constitution argued that these provisions created too great a division between the federal government and the people. While proponents of the Constitution cautioned against an overreliance on the will of the majority,²⁷ they did not wholly dismiss the principle of majority rule. Rather, they argued that it needed to be tempered and that tempering was best achieved not by having unelected or irremovable officials but rather by dividing the legislature into two Houses,²⁸ overlaying various electoral districts (for example, having each voter represented by a Congressman and Senator),²⁹ vesting in the President the power to veto legislation,³⁰ and dividing power across multiple branches of the federal government.³¹

The republican focus of the new Constitution recognized that, while direct democracy was an undesirable system,³² government was only tolerable if lawmakers were answerable to the people. Hamilton defended the unitary Presidency by emphasizing that “plurality in the executive . . . tends to conceal faults and destroy responsibility.”³³ James Madison, in *The Federalist No. 63*, was one of the first writers to use “responsibility” to mean a duty or obligation owed by the representative to the people;³⁴ his “responsibility” was wholly intertwined with his conception of accountability: the people must be able to hold the representative to account

23. HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 17 (1981).

24. THE FEDERALIST NOS. 47, 62, 63 (James Madison).

25. THE FEDERALIST NO. 68 (Alexander Hamilton).

26. THE FEDERALIST NO. 54 (James Madison).

27. THE FEDERALIST NO. 10 (James Madison).

28. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

29. THE FEDERALIST NO. 62 (James Madison).

30. THE FEDERALIST NO. 73 (Alexander Hamilton).

31. THE FEDERALIST NOS. 47, 48 (James Madison).

32. THE FEDERALIST NO. 10 (James Madison).

33. THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

34. THE FEDERALIST NO. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961); OXFORD ENGLISH DICTIONARY “Responsibility (2)(b)”.

for all of those things within his power, the things for which he has a responsibility toward them.³⁵

Modern commentators have continued to place political accountability at the heart of the American constitutional system. John Hart Ely stressed that the most important role of federal courts should be to preserve the fundamentally democratic aspects of the constitutional system—to protect democratic republican government itself and to allow that structure to protect substantive rights.³⁶ Ely's argument puts political accountability at the center of the constitutional system. It is the foundation upon which all other aspects of the system rely. It encourages citizens to engage in the political processes. It allows the people to protect the liberties that are most vital to them. Nor was Ely alone in privileging the outcome of the political process. The transition from the era of court protection of substantive economic rights that prevailed under *Lochner v. New York*³⁷ to the more deferential system of *United States v. Carolene Products*,³⁸ *West Coast Hotel v. Parrish*,³⁹ and *Williamson v. Lee Optical Co.*,⁴⁰ depended upon the presumption that the people themselves, through the political processes, would act to defend their vital interests. Justice Stone's famous footnote in *Carolene Products* relied precisely on the presumption of political accountability. Justice Stone suggested that the Court should concern itself only with protecting the directly enumerated rights and the political process because the political process "can ordinarily be expected to bring about repeal of undesirable legislation."⁴¹ Such repeal can only happen when elections take place in an environment of political accountability. When the people's ability to link policies

35. THE FEDERALIST NO. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961).

36. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

37. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a work hours regulation as an interference in freedom to form contracts); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down Louisiana regulatory statute as an infringement of economic liberty to form contracts); *Mugler v. Kansas*, 123 U.S. 623 (1887) (in which the Court clearly articulated its willingness to investigate the legislature's reasoning in enacting a statute before upholding or overturning it).

38. 304 U.S. 144 (1938) (upholding federal legislation aimed at regulating the sale of milk products in interstate commerce).

39. 300 U.S. 379 (1937) (upholding legislation enacting a minimum wage as a valid exercise of legislative authority).

40. 348 U.S. 483 (1955) (upholding legislation restricting lens fitting to licensed optometrists or ophthalmologists).

41. *Carolene Products*, 304 U.S. at 152 n.4.

to policy makers is disturbed, the people can no longer effectively protect their rights or interests.

At the same time that courts became increasingly deferential to legislatures, the nature of the legislative process was changing. Beginning with the passage of the Interstate Commerce Act in 1887,⁴² Congress transferred an ever-increasing regulatory authority to agencies and commissions ostensibly within the executive branch but actually inhabiting a vague area partially within and partially outside the institutions created by Articles I, II, and III. The political revolutions of the Progressive and New Deal eras vastly expanded the growing federal regulatory apparatus.⁴³ Congress was influenced by the work of James Landis and others who argued that expert policymakers in federal agencies could craft regulations that were more efficient, better tailored to the needs of the modern economy, and better able to respond quickly to change than could Congress.⁴⁴ The agencies Congress created held broad rulemaking authority under statutes delegating vague and expansive powers. They

42. Act of February 4, 1887 (Interstate Commerce Act), Pub. L. No. 49-41, 24 Stat. 379.

43. Between 1906 and 1946, Congress created the Food and Drug Administration, Pure Food and Drug Act, 34 Stat. 768, 1906; the Federal Reserve Board, Federal Reserve Act, 38 Stat. 251, 1913; the Federal Trade Commission, Federal Trade Commission Act, 38 Stat. 717, 1914; The Commodity Futures Trading Commission, Grain Futures Act, 42 Stat. 998, 1922, modified by the Commodity Exchange Act, 49 Stat. 1491, 1936; The Federal Deposit Insurance Corporation, The Banking Act of 1933, 48 Stat. 162, 1933; the Federal Communication Commission, Communications Act of 1934, 48 Stat. 1064, 1934; the Federal Energy Regulatory Commission, Federal Power Act, 49 Stat. 847, 1935; the Securities and Exchange Commission, Securities Exchange Act of 1934, 48 Stat. 881, 1934; the National Labor Relations Board, National Labor Relations Act (Wagner Act), 49 Stat. 449, 1935; the United States Maritime Commission, Merchant Marine Act 49 Stat. 1985, 1936; the United States Atomic Energy Commission, Atomic Energy Act (McMahon Act), 60 Stat. 755, 1946.

44. In an illustrative passage in his foundational text, Landis argued, "In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems. It represents a striving to adapt governmental technique, that still divides under three rubrics, to modern needs and, at the same time, to preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government . . . if in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines. As yet no organization in private industry either has been conceived along those triadic contours, nor would its normal development, if so conceived, have tended to conform to them. Yet the problems of operating an industry resemble to a great degree those entailed by its regulation. . . . The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes" JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 1, 10, 46 (1938).

instituted policymaking by expert commissioners and were ostensibly insulated from the corrupting influence of politics. In the first half the twentieth century, Landis's vision of government by agency was largely realized.

In the succeeding half-century many of the underlying assumptions that made Landis's program most attractive were substantially undermined. Agencies were established to limit the distorting influence lobbyists and business had over Congress, but it soon became apparent that industry power over agencies was even greater and lobbyists themselves were frequently appointed as expert commissioners. Beginning in the mid-1950s, a number of economists undermined the presumption of regulatory neutrality by discussing the cost-benefit imbalance facing regulated industries and the public at large in interactions with regulatory agencies. Public choice theory and the theory of regulatory capture were both born in this period, as was the revolving door between industry and regulatory bodies.⁴⁵

Agencies have also shown a surprising willingness to be creative with the authority delegated to them. In 1962, while operating under a statute that gave it *no rulemaking power*, the Federal Trade Commission amended its internal rules to give itself the ability to promulgate regulations.⁴⁶ It then sought to enforce its newly created rules through its pre-existing adjudicative structure.⁴⁷ Only after several lower courts overruled its enforcement actions did the agency abandon its rulemaking adventure.⁴⁸ Similarly, in 1996 the Food and Drug Administration

45. See, e.g., MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION, ch. 3 (1955); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); Richard Posner, *The Concept of Regulatory Capture: A Short, Inglorious History in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2013). The development of this body of economics has continued to the present day. See S. COMM. ON GOV'T AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION, 6-7, 67-81 (1977); David Martimort, *The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs*, 66 REV. OF ECON. STUD. 929 (1999); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

46. Barbara Cohen, Note, *Substantive Rulemaking and the FTC*, 42 FORDHAM L. REV. 178, 178 (1973).

47. *Id.* at 178-79.

48. Congress chose to reward this behavior by expanding the agency's statutorily authorized rulemaking power. 16 C.F.R. §§ 1.61-1.67 (1966), as amended 16 C.F.R. §§ 1.11-1.16 (1973); Cohen, *supra* note 46, at 178 n.5. By passing this bill, Congress demonstrated that the normal political process is often capable of ad-

asserted regulatory authority over the production, sale, and consumption of tobacco products despite a lengthy history of failed amendments in Congress that would have expressly granted it such power.⁴⁹ In overturning the agency's rules, the Supreme Court found it "clear that Congress intended to exclude tobacco products from the FDA's jurisdiction."⁵⁰ Contrary to the agency's view of its own authority, the Court found it an "inescapable conclusion[] that there is no room for tobacco products within the FDCA's regulatory scheme."⁵¹ Congress eventually addressed the issue by giving the regulatory agency the authority it had sought,⁵² but the political climate surrounding tobacco use underwent a considerable shift between 1996, when the FDA first asserted its authority, and 2009, when the agency gained its authority legitimately. The FDA and FTC cases demonstrate several troubling tendencies common to regulatory agencies: first, that in the pursuit of their statutory objectives they may adopt powers not rightfully delegated to them by law; second, that they can easily outpace the political appetite for regulation; third, that regulatory agencies can be effectively controlled by judicial review limiting or restraining their regulatory abilities; and finally that if the people truly desire the ends sought by the overzealous regulator, those ends can be accomplished through the traditional legislative process.

The federal regulatory state is undeniably an enduring feature of modern government. No change in judicial doctrine alone is likely to change that, nor should it.⁵³ The question is

dressing a shortcoming even when a regulator may think only it is sufficiently nimble to do so.

49. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000).

50. *Id.* at 142.

51. *Id.* at 143.

52. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 901, 123 Stat. 1776, 1786–87 (2009).

53. To the extent the federal regulatory state may be curtailed, the impetus for such reform should come through the political branches. The objective of this Note is to more closely tie the regulatory agencies to the political process so that they respond to the people's political will, contracting or expanding as the people desire. In the past year, the Court has noted with increasing concern the concentration of power in regulatory agencies and the substantial departure from the principles of the Founders that this concentration entails. See *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1241–45 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213–22 (2015) (Thomas, J., concurring).

not whether we will continue to have regulatory agencies, but rather how and to what extent Landis's objective of regulatory efficiency can be realized without unduly comprising the fundamental principle of political accountability. As the regulatory process now stands, we have transitioned from a system in which a policy had to overcome the hurdles of bicameralism and presentment before becoming law to one in which bicameralism and presentment stand as barriers to the repeal of laws drafted through agency rulemaking. Where the Constitution's formalized legislative process once served to protect the American people from the diminution of liberty that all regulation entails, it now serves to hamper the people in their efforts to lessen the burdens of regulatory pressure.⁵⁴

II. THE NONDELEGATION DOCTRINE AND CONGRESSIONAL ACCOUNTABILITY

The nondelegation doctrine is best known for what it isn't: a successful means of preventing the congressional delegation of legislative authority. Professor Cass Sunstein is far from alone in pointing out the brevity and inconsequentiality of the clause as a serious constitutional doctrine.⁵⁵ Nevertheless, it is a doctrine that continues to receive token acknowledgement throughout the field of administrative law⁵⁶ and, as we shall see, can make a significant contribution to protecting republican self-government.

54. Rulemaking by politically independent agencies also makes it impossible for the federal government to pursue coordinated regulatory objectives. Absent presidential control, every commission is able to pursue its own objectives regardless of whether its chosen means are rendered counter-productive by regulations promulgated by a separate commission. See *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013); *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011) (addressing a dispute between the Department of Energy, the President, and the Nuclear Regulatory Commission, which all had conflicting jurisdiction and contrasting positions concerning the discontinuation of the nuclear waste storage facility under construction in Yucca Mountain, Nevada).

55. The nondelegation doctrine has the rare distinction of having achieved dead letter status in all three areas of the law: jurisprudence, *Whitman v. Am. Trucking Associations, Inc.*, 531 U.S. 457 (2001), academic scholarship, see, e.g., Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003), and even instructional texts, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 372 (2010) (containing an entire subsection entitled "The (Brief) Rise and (Long) Fall of the Nondelegation Doctrine").

56. By repeated invocation of the intelligible principle test of *J.W. Hampton v. United States*, 276 U.S. 394 (1928), courts acknowledge that there are some delegations (however rare) that would violate the nondelegation doctrine. Far from

The nondelegation doctrine holds that “the lawmaking function belongs to Congress and may not be conveyed to another branch or entity.”⁵⁷ The doctrine’s most noteworthy applications came at the height of the New Deal when the Court, in *Panama Refining*, struck down a peripheral provision of the National Industrial Recovery Act, and, in *Schechter Poultry*, struck down the very heart of the same act.⁵⁸ These decisions held that Article I’s vesting clause irrevocably placed certain core legislative functions in the Congress. Although Congress could delegate some discretion to executive agents in applying the law,⁵⁹ it could not give unfettered power over policymaking to the President or his subordinate officers.

In *Schechter Poultry*, the Court found the statute unacceptable not merely because it delegated power but because the delegation was entirely unconstrained. The statute gave the president “unfettered discretion”⁶⁰ and “[did] not undertake to prescribe rules of conduct to be applied to particular states of fact . . . [instead] it authorize[d] the making of codes . . . [and] set[] up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion.”⁶¹ Even Justice Cardozo, no enemy of the New Deal, wrote in concurrence that the NIRA established “a roving commission to inquire into evils and upon discovery correct them” whose creation was “delegation run[] riot.”⁶²

Schechter Poultry and *Panama Refining* both rest primarily on the text of Article I’s vesting clause.⁶³ The text of Article I, § 1, cl. 1 was no accident. It encapsulates a fundamental principle

overturning the principle of the doctrine, the body of modern administrative law is built atop it.

57. *Loving v. United States*, 517 U.S. 748, 758 (1996); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420 (1935) (“Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.”).

58. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. at 430.

59. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) (upholding the delegation to the President of discretion to suspend import tariffs); *J.W. Hampton*, 276 U.S. at 394 (upholding legislation authorizing the President to set the appropriate rate for customs duties).

60. *Schechter Poultry*, 295 U.S. at 537.

61. *Id.* at 541.

62. *Id.* at 551, 553 (Cardozo, J., concurring).

63. *Id.* at 529; *Panama Refining*, 293 U.S. at 421.

of self-government. The drafters of the Constitution were steeped in the writings of John Locke, who argued that:

[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.⁶⁴

The commitment to nondelegation proceeds from the people's decision to place political power in the legislature. Once the people have undergone this act of institutional creation, the legislature cannot amend the government's constitution by renouncing its obligations.⁶⁵

The New Deal Court quickly retreated from the heights of *Schechter Poultry* to the line established in *J.W. Hampton*: that Congress may delegate broad rulemaking power so long as it also establishes an "intelligible principle" to the agency.⁶⁶ The

64. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 75 (C.B. McPherson ed., 1980) (1690). Nor was Locke alone in his position. The Baron de Montesquieu joined him, as did various commentators and pamphleteers stretching into the English Civil Wars, a century prior to the American Revolution. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1215–16 (2015) (Thomas, J., concurring).

65. Neither Locke nor even the most ardent nondelegationists renounce any possibility of delegation. In his *Second Treatise*, Locke went on to defend the Executive's prerogative:

power to act according to discretion, for the public good, without prescription of the Law, and sometimes even against it . . . for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.

Id. at 84. Similarly, Blackstone noted "the making of laws is entirely work of . . . the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws into execution must frequently be left to the discretion of the executive magistrate." 1 WILLIAM BLACKSTONE, COMMENTARIES *260–61. While Blackstone and Locke accept the value of delegation, the delegations they accept are to a *unitary executive*. The people can clearly identify the individual wielding the delegated authority and act politically against him if they so choose. Our modern Removal Power clause has stripped the American people of a similar ability. See text *infra* Part III.

66. *J. W. Hampton v. United States*, 276 U.S. 394, 409 (2008).

intelligible principle test was not new in *J.W. Hampton*,⁶⁷ but it was most clearly articulated there. This standard has been re-articulated again and again and defines the modern nondelegation doctrine.⁶⁸ Congress is permitted to delegate using merely an intelligible principle because of the “necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly.”⁶⁹

The modern permissive attitude to delegation rests on the notion that what regulatory agencies do is application of the law rather than policymaking.⁷⁰ When one fairly considers the relative role of Congress and federal agencies in setting the policies of the government, however, this argument quickly becomes untenable. It may be true that the agency action was execution rather than lawmaking in *J.W. Hampton*, where the statute declared a tariff covering the difference between the cost of domestic production and foreign production of a manufactured good and directed the agency to adjust it as prices varied.⁷¹ In the modern administrative state this sort of limited implementation is the exception rather than the rule; today’s agency rulemaking generally involves complex policy balanc-

67. See, e.g., *Interstate Commerce Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912) (“The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter with the rules laid down by Congress.”); *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“When Congress had legislated and indicated its will, it could give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations”).

68. See e.g., *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (quoting *J.W. Hampton*, 276 U.S. at 409) (So long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (it is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority”).

69. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935); see also *J.W. Hampton*, 276 U.S. at 409 (Congress must be allowed to make delegations in order to address “changing conditions”).

70. “Creating rules pursuant to valid statutory authority isn’t lawmaking, but law execution.” Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–26 (2002).

71. *J. W. Hampton*, 276 U.S. at 401.

ing that more closely resembles legislative decisionmaking.⁷² While the Court's majority still holds that agencies wield only executive power, a number of justices recognize that "[a]lthough modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."⁷³

The fatal flaw of the intelligible principle test is its toothlessness. Justice Scalia, in *Whitman v. American Trucking Association*, explored just how vapid the test actually is before going on to accept a similarly meaningless statement of delegation.⁷⁴ Justice Scalia noted previous cases permitting delegations to the SEC to ensure holding companies are not organized in an "unduly

72. Take, for example, the funeral rules established by the FTC. 16 C.F.R. § 1.453 (2013). Among other things, they forbid the embalming of bodies without prior approval of the family member, a state mandate, or an inability to contact family members after reasonable efforts. 16 C.F.R. § 1.453.5(a) (2013). This may be a very sensible regulation, and may also be a regulation that Congress itself would pass if given the opportunity, but one can safely guarantee that no member of Congress had in mind restricting illicit embalming of bodies when he voted to approve the provision of the Federal Trade Commission Act banning "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Federal Trade Comm'n Act, ch. 311, § 5, 38 Stat. 719, *codified* at 15 U.S.C. § 45(a) (2006).

73. *City of Arlington v. FCC*, 133 S. Ct. 1868, 1877–78 (2013) (Roberts, C.J., dissenting). Justices on both sides have echoed Chief Justice Roberts' observation that the emperor, in fact, has no clothes. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) ("[I]t has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce [the Constitution]"); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I am not convinced the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative'"); *id.* at 488 (Stevens, J., concurring) ("The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited . . . Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not 'legislative power.' . . . I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'").

74. *Whitman*, 531 U.S. at 473–74 (upholding a delegation to the EPA to set emission standards "at a level that is requisite to protect public health").

or unnecessarily complicate[d]" manner;⁷⁵ to the Office of Price Administration to set prices at a level "generally fair and equitable;"⁷⁶ and to the Federal Communication Commission and the Interstate Commerce Commission to regulate spectrum use and railroad consolidations, respectively, in accordance with the "public interest."⁷⁷ In short, the Court has "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"⁷⁸ A clear statement rule it is not.

To the extent today's Court is concerned about nondelegation, it is concerned with the possibility of encroachment by one branch upon another.⁷⁹ The Court is loathe to permit one branch to aggrandize itself at the expense of other branches,⁸⁰ but it is unfortunately willing to permit a branch to abdicate its constitutional authority. In so doing, the Court seriously underestimates the threat to liberty and the separation of powers posed by abdication absent aggrandizement.⁸¹ In the case of aggrandizement,

75. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946).

76. *Yakus v. United States*, 321 U.S. 414, 420 (1944).

77. *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943); *New York Cent. Sec. Corp v. United States*, 287 U.S. 12, 24–25 (1932).

78. *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); Justice Scalia's acceptance of the delegation in *Whitman* as one of executive power is particularly confounding given his distress over the delegation in *Mistretta*: "the lawmaking function of the Sentencing Commission is completely divorced from any responsibility for the execution of the law Because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does The power to make law at issue here, in other words, is not ancillary but quite naked The Court errs . . . not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress." *Mistretta*, 488 U.S. at 420–21, 427.

79. *See, e.g., Mistretta*, 488 U.S. at 395 ("in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed."). In *Loving v. United States*, Justice Kennedy characterized the nondelegation doctrine as "another strand of our separation-of-powers jurisprudence." 517 U.S. 748, 758 (1996).

80. *See, e.g., Clinton v. City of New York*, 524 U.S. 417 (1998) (overturning the Line Item Veto as an unconstitutional violation of the process bicameralism and presentment that granted to the President legislative power rightly residing in the Congress); *Bowsher v. Synar*, 478 U.S. 714 (1986).

81. In oral arguments for *NLRB v. Noel Canning*, counsel for Noel Canning argued that abdication, even abdication in which both branches acquiesce, is no less problematic than aggrandizement: "The political branches of the government have no authority to give or take away the structural protections of the Constitution. They

the diminished branch can and often will respond in defense of its own prerogatives.⁸² In the case of abdication, however, the only injured party is the American people. When Congress delegates its policymaking power to an agency, the power of making laws passes out of the hands of those to whom the people have entrusted it.⁸³ More importantly, Congress is permitted to sever the ties of political accountability that link the people to the laws governing them. Members of Congress are liberated from the negative consequences of passing unpopular legislation when an agency promulgates the policy through rulemaking or adjudication.⁸⁴ Legislators are also able to disclaim responsibility for cre-

don't exist to protect the Senate from the President or the President from the Senate. These are liberty-protecting provisions that protect the people from the government as a whole. So if the Constitution is quite clear as to what those structural protections are, but the political branches . . . have conspired to deplete them, that is illegitimate, and it should be rejected by this Court." Transcript of Oral Argument at 43–44, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281).

82. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, *cf.* *United States v. Lovett*, 328 U.S. 303 (1946).").

83. It is true that Congress retains significant influence over independent agencies through appropriations and oversight; this oversight may be extensive enough that the independent agencies are, in fact, the creatures of the congressional subcommittees. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994) (arguing that committee Chairmen, who control independent agencies at the expense of the President, are more prone to Madison's vision of faction and less politically accountable than the executive); see also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) ("the independent agencies are sheltered not from politics but from the President, and . . . their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction"). Even if that is so, however, it is control without accountability—the subcommittees may badger regulators who come before them in hearings and will aggressively defend independent agencies from executive branch influence, but Congress need take no responsibility for the actions of the agency.

84. Several scholars have argued that delegations create no problem of accountability since the lawmakers will be held to account for the delegation and thereby for the actions taken by the delegate. See, e.g., Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). These accounts rely on an expectation that voters are familiar not only with the activities of regulatory agencies but also that they know the details of the interactions between the Administrative Procedure Act, the organic statutes creating agencies, and the statutes delegating authority to them. Voters face a barrage of information from the government and are confronted with particular opacity when the government acts in ways that voters find unpopular. The elaborate system of delegat-

ating laws the people desire since they can credibly claim that the authority to do so lies with an agency and that it is the fault of the agency that insufficient action has been taken. The Court's use of the intelligible principle test masks this abdication. It encourages Congress to pass the most difficult choices into the hands of agencies while allowing Congress to take responsibility for "doing something."⁸⁵

III. THE REMOVAL POWER DOCTRINE AND THE LACK OF EXECUTIVE ACCOUNTABILITY

The intelligible principle test isolates independent regulatory agencies from meaningful political accountability through the legislative branch. In a similar fashion, the Court's removal power doctrine has insulated independent commissions from political accountability through the executive branch. By so doing, the Court greatly heightens the danger of a loss of self-government that lies at the root of the nondelegation doctrine.

The evolution of the removal power doctrine has been a winding path. When first confronted with the question, the Court found an implied power of removal in Article II's Vesting and

ed policymaking at work today allows members of Congress and the President to have it both ways: they can claim to have done something to address a problem when they pass broad legislation or conduct oversight hearings and, at the same time, deny responsibility for the details of regulations as the agency puts them forward and seeks to enforce the bill. Elected officials and agency administrators further diminish electoral accountability with frequent calls for neutral, expert, or unbiased policymaking by federal regulators. All regulatory decisions, even those made on the basis of scientific expertise or knowledge involve policy considerations (the relative value of a reduction in financial risk, or the incremental protection of the ability of a union to organize). By delegating decisionmaking and claiming that neutral experts make the decisions, members of Congress seek to avoid any responsibility to voters for federal policy.

85. Consider, for example, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Congress was awarded credit for having "done something" to address the financial crisis, but at the same time was able to shift blame for the difficult balancing required in actually drafting the particulars of the hundreds of rules required by the act. *See, e.g.,* Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST, July 16, 2010; Lydia Depillis, *Dodd-Frank is 3. So Why Isn't It Ready Yet?*, WASH. POST, July 2, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/dodd-frank-is-3-so-why-isnt-it-ready-yet/> [<http://perma.cc/6589-BNC2>]; Kevin McCoy, *Dodd-Frank act: After 3 Years, a long to-do list* USA TODAY, Sept. 12, 2013, <http://www.usatoday.com/story/money/business/2013/06/03/dodd-frank-financial-reform-progress/2377603/> [<http://perma.cc/VQF4-PJHR>].

Take Care clauses.⁸⁶ Chief Justice Taft wrote an exhaustively researched opinion arguing from a historical and pragmatic perspective that the President, in whom the executive power of United States was entrusted, must be free from any congressional efforts to restrict his ability to remove (and thereby his ability to control) members of the executive branch.⁸⁷ Taft's reasoning, although clearly articulated, did not endure. Nine years later, the Court severely cabined the rule laid down in *Myers*. Justice Sutherland, in a comparatively cursory opinion, ruled that, since the commissioner of an independent agency held power that was quasi-executive, quasi-legislative, and quasi-judicial, he was not exclusively a member of the executive branch.⁸⁸ Therefore, the President's interest in direct oversight was counterbalanced by Congress's intent to create political independence. The Court found the President's power to remove policymaking members of independent commissions could be restricted by Congress and narrowed *Myers* to prohibit Congress from requiring Senate approval of removals.⁸⁹ Fifty years later, the Court once again upended the removal power doctrine by casting away the categories of "quasi-judicial," "quasi-legislative," and "quasi-executive."⁹⁰ Instead, the Court decided that the President's removal power could be limited so long as "the removal restrictions are of such a nature that they [do not] impede the President's ability to perform his constitutional duty" or "unduly trammel[] on executive authority."⁹¹

As with the nondelegation doctrine, the overwhelming majority of the criticism following *Humphrey's Executor* and *Morrison*

86. *Myers v. United States* 272 U.S. 52, 164 (1926).

87. *Id.* at 175–76.

88. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935).

89. The line drawn was between aggrandizement and limitation. Limiting the President's authority, without increasing Congress's power, was permitted. *Id.* at 626, 629–30.

90. *Morrison v. Olson*, 487 U.S. 654, 689 (1988).

91. After pronouncing this standard, the Court failed to define it any meaningful way. *Id.* at 691. The Court, relying heavily on the language of political accountability, has recently breathed new life into the proposition that the president's removal power must be read more expansively than *Morrison* would suggest. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). See *infra* n.109–17 and accompanying text.

has focused on the threat posed to the separation of powers.⁹² In *Morrison* itself, Chief Justice Rehnquist, writing for the Court, emphasized that the fatal flaw in *Myers* was the way that Congress “dr[ew] to itself . . . the power to remove or the right to participate in the exercise of that power.”⁹³ Congress’s limitation of the President’s power was not, in itself, a threat to the separation of powers. Rather the threat arose when Congress attempted to “encroach[] or aggrandize[] . . . one branch at the expense of the other.”⁹⁴ Justice Scalia, in his dissent, was even more direct about the perils posed by undermining the separation of powers:

[T]he provision at issue here provides that “[t]he executive Power shall be vested in a President of the United States of America.” . . . That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that “a gradual concentration of the several powers in the same department” can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evi-

92. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005).

93. *Morrison*, 487 U.S. at 686.

94. *Id.* at 693. A similar distaste for congressional aggrandizement at the expense of the President led the Court two years before *Morrison* to overturn the Graham-Rudman-Hollings Balanced Budget Act of 1985 because Congress retained the power to remove the officer charged with executing part of the Act. *Bowsher v. Synar*, 478 U.S. 714 (1986). The distinction between aggrandizement and limitation seems to be the distinguishing principle dividing *Morrison* and *Mistretta* on the one hand (in which the Court found no unconstitutional derogation of the separation of powers) from *Bowsher* and *Chadha* on the other (in which the Court rejected statutes that drew executive authority into the Congress). Lawrence Lessig & Cass R. Sunstein, *The President and The Administration*, 94 COLUM. L. REV. 1, 114 (1994). In other cases, the Court has clearly stated that aggrandizement raises separation of powers concerns where limitation absent aggrandizement would not. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856–57 (1986). In upholding a statute limiting the power of federal courts, Justice O’Connor explained: “Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.” *Id.*

dent, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.⁹⁵

Justice Scalia's primary concern was defending the separation of powers in order to defend liberty.⁹⁶ Toward the end of his dissent, Justice Scalia took an out of character detour into the practical results of the Court's decision, emphasizing that removing the separation of powers pronounced by the Constitution undermined political accountability and thereby the people's freedoms.⁹⁷

While the nondelegation doctrine has been practically dead since the mid-1930s,⁹⁸ the removal power remains a point of sharp contention.⁹⁹ Those in favor of a unitary executive argue that having a powerful President is a constitutional necessity required by practical considerations that favor political accountability.¹⁰⁰ Even those who support limitations on the President's removal power acknowledge that a unitary executive "can promote important values of accountability, coordination, and uniformity"¹⁰¹ and encourage executive oversight of independent

95. *Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting) (internal citations omitted) (quoting U.S. CONST. art. II, § 1, cl. 1; THE FEDERALIST No. 51 at 321 (James Madison) (Clinton Rossiter ed., 1961)).

96. *See id.* at 697–99, 710–11.

97. *Id.* at 727–33. It is those themes that animate this Note—that the separation of powers matters not merely to keep the branches in balance with one another but in order to strengthen the political accountability of the branches and thereby the people's liberty and power of self-government.

98. *But see* *Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666 (D.C. Cir. 2013) (finding a congressional delegation of rulemaking power to Amtrak and the DOT, jointly, unconstitutional on the grounds that it unlawfully delegates legislative power to a private actor), *vacated*, 135 S. Ct. 1225 (2015) (holding that Amtrak is part of the government and that, therefore, no private delegation occurred without deciding whether such delegation would be permissible).

99. Compare STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 2008; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Theodore B. Olson, *Founders Wouldn't Endorse America's Plural Presidency*, LEGAL TIMES, Apr. 27, 1987; John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1946–1955 (2009), with Lessig & Sunstein, *supra* note 94.

100. Political accountability, however, is a secondary concern for most critics of the Court and generally receives only passing notice. Yoo, *Unitary Executive*, *supra* note 99 at 661–33.

101. Lessig & Sunstein, *supra* note 94, at 2.

agencies through other modes.¹⁰² As Professor Peter Strauss notes, even otherwise independent agencies “need goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy.”¹⁰³ Reliance on the White House for support in those arenas, however, does not create dependence on the part of the agency or control on the part of the President, nor does it create a relationship of accountability by which the public will hold the President responsible for the agency’s action or inaction. The entire purpose of *Humphrey’s Executor* and *Morrison* is to acknowledge the *independence* of the agents in question. To pretend that those actors are nevertheless under the control of the President ignores the significance of the Court’s decision in those cases and the care with which Congress regularly chooses to limit the President’s removal power *in order to insulate commissioners from presidential influence*.

Developments in presidential regulatory management over the past forty years have demonstrated the sharp divide between executive and independent agencies. In February 1981, President Reagan issued Executive Order 12,291 requiring all executive branch agencies (but not independent commissions) to submit major regulation proposals to a newly created office within the Office of Management and Budget (OMB). This new office, the Office of Information and Regulatory Affairs (OIRA), had to receive a regulatory impact analysis of any proposed major rule, including a cost-benefit analysis, from every executive agency.¹⁰⁴ OMB had authority to coordinate regulatory activity, suggest interagency collaboration, assess the need for statutory changes governing the agencies, and review whether extant regulations were within the existing statutory authority of the agency.¹⁰⁵ Four years later, President Reagan significantly expanded OIRA’s power.¹⁰⁶ He centralized OIRA and OMB’s power over rulemaking by establishing a new regulatory planning process. OMB would have to assess all executive rulemaking

102. Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Lessig & Sunstein, *supra* note 94, at 111–12.

103. Strauss, *supra* note 102, at 594.

104. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

105. *Id.* at 13,195.

106. Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (Jan. 4, 1985).

(but again, not independent agency rulemaking) given the President's philosophy and priorities before the agencies could promulgate the rules. President Clinton later amended OIRA's role but largely retained the framework of presidential oversight of *executive* agencies established in the Reagan Administration.¹⁰⁷

The Reagan and Clinton executive orders greatly increased the President's influence over the regulatory process within executive departments. Even though the President did not formally approve or reject the proposed rules, White House oversight transformed the executive rulemaking process from one in which "all parties understood final decision making authority to rest with the initiating agency" to one in which the White House exercised substantial control.¹⁰⁸ The decision to exclude independent commissions from the process reveals the destructive impact of the removal power doctrine. While Executive Orders 12,291 and 12,498 made much of the regulatory state politically accountable to the White House, they only further established the "otherness" of independent agencies and reiterated that they exist *outside* the constraints of executive oversight.¹⁰⁹

In its most recent decision on the removal power, the Court began to recognize that the President's ability to remove officers speaks not only to the separation of powers but also to fundamental questions about the accountability of the government. Chief Justice Roberts, writing for the Court in *Free Enterprise*

107. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sep. 30, 1993).

108. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2276–77, 2278–79 (2001).

109. Some scholars have argued that the Reagan Administration's decision to exclude independent commissions from 12,291 and 12,498 was a political judgment rather than a legal conclusion. See PETER M. SHANE & HAROLD M. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 358–60 (1988); Kagan, *supra* note 108, at 2278. Even if this is the case (and it seems probable that it was), it only further demonstrates the destructive impact the removal power doctrine has had over the political process. As a result of *Humphrey's Executor* and *Morrison*, American political culture has come to believe that political influence over an "independent" agency is undesirable even when that same oversight is considered a great benefit to the same sort of rulemaking by executive agencies. Extensive presidential oversight of the regulatory process yields considerable advantages: "Centralized review of proposed regulations under a cost/benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation. It encourages policy coordination, *greater political accountability*, and more balanced regulatory decisions." Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1982) (emphasis added).

Fund, opened his second paragraph by clearly stating, “[S]ince 1789, the Constitution has been understood to empower the President to keep executive officers¹¹⁰ accountable—by removing them from office, if necessary.”¹¹¹ Throughout his opinion, Roberts emphasized that the danger of the double removal protection created by the statute is not, as in *Bowsher*, that it reduces the President’s power and aggrandizes Congress’s power but rather that it interferes with the President’s own ability to “oversee the faithfulness of the officers who execute [the Laws]” and that such an infringement alone, even absent aggrandizement, is unconstitutional.¹¹² Roberts’s concern with the statutory structure is two-dimensional: the failure of accountability runs in both directions when the statute establishes “a Board that is not accountable to the President, and a President who is not responsible for the Board.”¹¹³ This failure of accountability strikes at the heart of our system of constitutional government:

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.” That is why the Framers sought to ensure that “those who are employed in the execution of the law will be in their proper situation, and the chain of dependence will be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the Community.”¹¹⁴

The value of presidential oversight is not in its regulatory efficiency. Presidential oversight will often turn against efficiency, but “[c]onvenience and efficiency are not the primary objec-

110. He is including in this category the heads of presumptively independent agencies. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 486 (2010) (parties and Court agree without establishing that SEC commissioners are protected by for cause removal provisions and hold that PCAOB members have similar protections).

111. *Id.* at 483. To support this proposition, Chief Justice Roberts cited *Myers*, raising it from the grave in which *Humphrey’s Executor* and *Morrison* had interred it.

112. *Id.* at 484.

113. *Id.* at 495.

114. *Id.* at 497–98 (citations omitted).

tive—or the hallmarks—of democratic government.”¹¹⁵ The central threat to liberty in the modern administrative state is not that the President will subvert an independent agency with political influence.¹¹⁶ As Chief Justice Roberts noted:

[O]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.¹¹⁷

The Court, in *Free Enterprise Fund*, was right to recognize the extent to which removal power limitations threaten the ties of political accountability linking the people to the government. Nevertheless, whether because the question of removal limitations per se was not presented to them, because the Court defers to precedent, or because of concern at deeply disrupting a vast swath of federal regulations, the Court narrowly cabined its holding. Having argued at length that removal limitations threaten the very foundations of democratic liberty, the Court rather arbitrarily decided that one layer of insulation was perfectly constitutionally acceptable but that two were intolerable.¹¹⁸ The likelihood of a further substantial change in the removal power doctrine in the near future is slim. Instead, in the final Section, we will consider alternate arrangements by which courts can restore and protect the links of political accountability that undergird the constitutional framework.

IV. DELEGATION AND REMOVAL PROTECTION: ONE OR THE OTHER

The Court’s neglect of the nondelegation doctrine and its post-*Humphrey’s Executor* removal power jurisprudence both independently raise serious threats to the political accountabil-

115. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

116. Rulemaking is rife with political influence regardless of the level of executive control. Even those administrative decisions that appear the most technocratic at a cursory glance are overlaid with deep layers of prioritization and choice. See *supra* note 45 and accompanying text.

117. *Free Enter. Fund*, 561 U.S. at 499.

118. For a summary of the Court’s emphasis on political accountability in *Free Enterprise Fund*, see *In re Aiken County*, 645 F.3d 428, 444–45 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

ity of the rulemaking process. In combination they do even greater damage to the Constitution's foundational principles of self-government. Together they allow the establishment of a fourth branch of government that is unaccountable to the people yet wields enormous regulatory power over them. For those who find this situation unacceptable, a solution must be found. Three will be considered below. First, we will consider whether courts should refuse to give *Chevron* deference¹¹⁹ to independent agencies and permit delegation to independent agencies only after applying a higher standard of statutory direction than *J.W. Hampton's* "intelligible principle" test. Second, we will consider whether the President should test the boundaries of "for cause" removal to restore executive oversight of regulatory agencies. Finally, we will consider whether courts should impose on Congress an exclusive choice of either delegating policymaking authority (that is the power to promulgate rules and conduct adjudications) to an agency or insulating the agency from executive oversight.

First, courts could decline to use *Chevron* deference and apply a higher standard of review than *J.W. Hampton's* intelligible principle test when Congress has delegated the regulatory power in question to an independent agency. Under the *Chevron* doctrine as it now stands, courts take a two-step approach to review of agency rulemaking.¹²⁰ First, the court considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the Congress."¹²¹ Alternatively, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹²² The second step is broadly deferential. The court will only overturn agency action in an ambiguous space if the action is "arbitrary, capricious, or manifestly contrary to the statute."¹²³ *Chevron* analysis presumes that Congress intends

119. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

120. *Id.*

121. *Id.* at 842–43.

122. *Id.* at 843.

123. *Id.* at 844.

statutory ambiguity to serve as a delegation to an agency.¹²⁴ *Chevron* deference gives enormous power to an agency, allowing it to regulate freely under broad statutory grants. Even when a court feels that the legislature would not adopt the regulation an agency has promulgated or the agency's regulation is not the best interpretation of the relevant statute, so long as the agency's interpretation is reasonable, the court will not overrule it.¹²⁵ This deference also gives agencies broad power to determine the extent of their own jurisdiction.¹²⁶

The first potential solution would reverse that presumption. Instead of presuming that ambiguity intends delegation, courts would hold that delegation could only take place narrowly—when Congress has clearly delineated the standard that it intends the agency to achieve. This test would require a clear statement of congressional intent sufficient to direct and restrain the agency. When a court disagrees with an agency's reading of a statute, the court could overturn the regulation even if it felt the agency's reading was a reasonable one. The court would not assess whether the agency's interpretation was a reasonable reading, but whether it was the best reading of the statute. The purpose would be to limit independent agencies to promulgating regulations¹²⁷ for which Congress made a clear request and outlined clear parameters. This test would encourage Congress to legislate more specifically and thereby to take greater responsibility for the final rule. Under such a test, the delegation in *J.W. Hampton*, which required only calculation and adjustment of a tariff based on fluctuating prices, would stand while the delegation in *Whitman*, which asked the agency to restrict pollutants to the level "requisite to protect public health" without defining public health or otherwise instructing the agency as to how it should balance the interests involved, would fail.¹²⁸

Unfortunately, our hypothetical test suffers from the same fundamental shortcoming that *Chevron* was designed to avoid. The hope of the non-deferential clear statement test would be to encourage Congress to clearly legislate its regulatory objectives and to take political accountability for them. In applica-

124. *Id.* at 843–44.

125. *Id.* at 844.

126. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013).

127. Whether through formal or informal rulemaking or through adjudications.

128. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473–74 (2001).

tion, the test would merely shift discretion from the independent agency to the reviewing court. If asked only to determine when Congress has or has not spoken authoritatively, courts would inevitably fall into policymaking—finding a clear statutory directive for regulations that seem sensible to them while more strictly scrutinizing regulations that seem unreasonable to them. The courts give broad deference to an agency's interpretive authority because doing otherwise would merely tempt judges with the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions about how to best construe an ambiguous term in light of competing policy interests—from agencies to federal courts.¹²⁹

As Justice Stevens first wrote in *Chevron*, “[J]udges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences.”¹³⁰ To this should be added the observation that judges are also unaccountable to the people. A stricter *Chevron* test requiring a clear statement of congressional intent is an unworkable solution no better than the problem.

Alternatively, the President could unilaterally attempt to bring independent agencies under his control. Professors Cass Sunstein and Lawrence Lessig proposed, for example, that statutes limiting the President’s ability to remove officers “for cause” nevertheless “allow discharge of commissioners who have frequently or on important occasions acted in ways inconsistent with the President’s wishes with respect to what is required by sound policy.”¹³¹ Nor are these scholars alone in holding such a position: the American Bar Association and the Department of Justice have, at various times, agreed with their position.¹³² This

129. *City of Arlington*, 133 S. Ct. at 1873. “These lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges.” *Id.*

130. *Chevron*, 467 U.S. at 865.

131. Lessig & Sunstein, *supra* note 94, at 111.

132. See Am. Bar Assoc. Recommendation, reprinted in Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 206–07; Memorandum for Hon. David Stockman, Director, Office of Management and Budget, reprinted in PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 355, 357–58 (1988).

adventurous position is difficult to square with *Humphrey's Executor*, which forbade the removal of an appointee on grounds of policy disagreement whose tenure was protected except in cases of "inefficiency, neglect of duty, or malfeasance in office."¹³³ If a President preferred a more modest approach, he could make more active and aggressive use of the tools discussed by Professor Strauss: "budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy."¹³⁴ The practice of governance, however, in the two decades that have passed since Professors Lessig and Sunstein wrote their article and the three since Professor Strauss's article, have shown no move by any President to take on increased oversight of independent agencies. This presidential reluctance is certainly understandable. As the political calculations made by the Reagan Administration demonstrate, there is a considerable initial cost for an administration to be seen as tampering with an independent agency. An administration is even less likely to encroach on an independent agency after the withering criticisms laid against the Bush Administration.¹³⁵ Even if a President chose to invoke the wrath of Congress and the press by challenging agency independence, his reward for success would be to spend the rest of his term receiving blame for all the shortcomings and unpopularity of independent agency regulations. Little wonder that Presidents have yet to kick down the doors of the independent regulatory commissions.

The third and most compelling potential solution is to have courts impose a simple institutional choice on Congress and the President: an agency may have policymaking authority, or it may have its director insulated from at will removal, but it may not have both. If an agency's director or commissioners have removal protections, it could not have any rulemaking or independent adjudicatory authority. The agency could pursue enforcement actions through litigation in federal courts, but it could no longer promulgate rules through formal or informal

133. *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935). To uphold Professors Lessig and Sunstein's contention, one would have to argue that "for cause" and "inefficiency, neglect of duty, or malfeasance in office," which have traditionally been understood to be very similar, are materially different standards.

134. See Strauss, *supra* note 102, at 594.

135. See, e.g., H. COMM. ON THE JUDICIARY MAJORITY STAFF, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH (2009).

rulemaking or through internal adjudications before the commissioners. This would be enforced through litigation challenging enforcement actions under the authority of rules or adjudications conducted by agencies with removal protections. Courts could either invalidate the rule or adjudication or, if they wish to avoid the disruption of invalidating a large number of federal regulations, could invalidate the removal protection.¹³⁶

This solution has several virtues in comparison with the others considered thus far. First and foremost, it respects and promotes the ability of the people to enact policies through the constitutionally established legislative process. It also establishes a clear rule that courts can easily apply without a multi-factor standard or balancing test: if an agency has removal protections and policymaking power, it is unconstitutionally established. If it has neither, or only one, there is no constitutional problem.¹³⁷ Unlike our first solution, it will not lead to policymaking by courts. The determination of whether a rule stands or falls would be made based not on the substance of the rule but on the structure of the agency that made it. The standard is content neutral. This solution also respects the co-equal dignity of the legislative and executive branches in relation to the judiciary. Congress and the President are free to determine between themselves through the normal legislative process which agencies should be accountable to the people through which of the elected branches. For some agencies, they may prefer to make the President publicly accountable for its actions and grant rulemaking or adjudicatory authority to an officer removable by the President at will. In other cases, they may wish to make Congress responsible for its enforcement proceedings and will establish a commission protected from presidential removal but limited to enforcement through feder-

136. The Court chose the latter remedy in *Free Enterprise Fund*, upholding the statute creating the PCAOB while ruling that PCAOB members could be removed at will by the Securities and Exchange Commissioners. 561 U.S. 477, 508 (2010).

137. It is undoubtedly true that agency actions other than policymaking can be tyrannical—the imprudent use of nonbinding “guidelines” (in the place of rules), repeated threats of civil litigation to induce unjust settlements, or intrusive oversight can all threaten liberty. These dangers, although real, are less than the risk presented by an agency holding the power to prosecute violations of rules it itself creates without being politically accountable for those rules. This latter danger, the compound threat to liberty, is what the proposed doctrine seeks to avoid.

al litigation.¹³⁸ In either case, the solution would be reached through the normally established constitutional process of bicameralism and presentment rather than by judicial fiat.

This proposed doctrine, which might be called the political accountability doctrine or the one or the other doctrine, would have several ramifications. It would dispel once and for all the notion that Landis's dream of government by impartial experts is either possible or desirable. It would greatly increase the political cost of federal regulations for the President and members of Congress. Finally, it would make it more difficult to pass federal regulations.¹³⁹ This loss, to the extent it is one, is a loss that our constitutional system is designed to create. After all, as Publius recognized, "[T]his complicated check on legislation [bicameralism and presentment] may in some instances be injurious as well as beneficial"¹⁴⁰ because "the power of preventing bad laws includes that of preventing good ones."¹⁴¹ In a tradeoff between greater political accountability and greater efficiency in regulation, we may well find that political accountability is the more important virtue.

David Casazza

138. The choice could also be looked at in reverse: that is to say that Congress and the President could agree to insulate certain officers from congressional control (by giving them rulemaking power) or from presidential interference (by giving them removal protections).

139. Although this last result may not prove true—it will only be more difficult to promulgate federal regulations to the extent that it is now easier for an independent regulatory commission to promulgate a rule than for an executive regulatory department to do the same. It may be that the result is not less regulation but better coordinated regulation—there will no longer be instances in which an executive agency and an independent agency pursue conflicting policies. *See, e.g., In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011).

140. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

141. THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).