THE RISE AND RISE OF THE ADMINISTRATIVE STATE

107 Harv. L. Rev. 1231 (1994)

Gary Lawson

The post-New Deal administrative state is unconstitutional,* and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution. The original New Dealers were aware, at least to some degree, that their vision of the national government’s proper role and structure could not be squared with the written Constitution: *The Administrative Process*, James Landis’s classic exposition of the New Deal model of administration, fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers. Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.

There is a perception among some observers, however, that this post-New Deal consensus has recently come under serious legal attack, especially from the now-departed Reagan and Bush administrations. But though debate about structural constitutional issues has clearly grown more vibrant over the past few decades, the essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations. The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.

THE DEATH OF CONSTITUTIONAL GOVERNMENT

[T]he modern administrative state openly flouts almost every important structural precept of the American constitutional order.

---

*I use the word “unconstitutional” to mean “at variance with the Constitution’s original public meaning.” That is not the only way in which the word is used in contemporary legal discourse. On the contrary, it is commonly used to mean everything from “at variance with the private intentions of the Constitution’s drafters” to “at variance with decisions of the United States Supreme Court” to “at variance with the current platform of the speaker’s favorite political party.” These other usages are wholly unobjectionable as long as they are clearly identified and used without equivocation. The usage I employ, however, is the only usage that fully ties the words “constitutional” and “unconstitutional” to the actual meaning of the written Constitution. A defense of this claim would require an extended essay on the philosophy of language, but I can offer some preliminary observations: consider a recipe that calls for “a dash of salt.” If one were reading the recipe as a poem or an aspirational tract, one might seek that meaning of “dash” that is aesthetically or morally most pleasing. But if one is reading it as a recipe, one wants to know what “dash” meant to an informed public at the time the recipe was written (assuming that the recipe was written for public consumption rather than for the private use of the author). Of course, once the recipe is understood, one might conclude that it is a bad recipe, either because it is ambiguous or, more fundamentally, because the dish that it yields simply isn’t very appealing. But deciding whether to try to follow the recipe and determining what the recipe prescribes are conceptually distinct enterprises. If the Constitution is best viewed as a recipe—and it certainly looks much more like a recipe than a poem or an aspirational tract—application of the methodology of original public meaning is the appropriate way to determine its meaning.*
The Death of Limited Government

The advocates of the Constitution of 1789 were very clear about the kind of national government they sought to create. As James Madison put it: “The powers delegated by the proposed Constitution to the federal government are few and defined.” Those national powers, Madison suggested, would be “exercised principally on external objects, as war, peace, negotiation, and foreign commerce,” and the states would be the principal units of government for most internal matters.

The expectations of founding-era figures such as James Madison are instructive but not controlling for purposes of determining the Constitution’s original public meaning: the best laid schemes o’ mice, men and framers gang aft a-gley. The Constitution, however, is well designed to limit the national government essentially to the functions described by Madison.

Article I of the Constitution vests in the national Congress “[a]ll legislative powers herein granted,” and thus clearly indicates that the national government can legislate only in accordance with enumerations of power. Article I then spells out seventeen specific subjects to which the federal legislative power extends: such matters as taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, national courts, piracy and offenses against the law of nations, the military, and the governance of the nation’s capital and certain federal enclaves. Article IV further grants to Congress power to enforce interstate full-faith-and-credit requirements, to admit new states, and to manage federal territories and property. Article V grants Congress power to propose constitutional amendments.

This is not the stuff of which Leviathan is made. None of these powers, alone or in combination, grants the federal government anything remotely resembling a general jurisdiction over citizens’ affairs. The Commerce Clause, for example, is a grant of power to regulate “Commerce ... among the several States,” not to regulate “all Activities affecting, or affected by, Commerce ... among the several States.” The Commerce Clause clearly leaves outside the national government’s jurisdiction such important matters as manufacturing (which is an activity distinct from commerce), the terms, formation, and execution of contracts that cover subjects other than the interstate shipment of goods, and commerce within a state’s boundaries.

Nor does the Necessary and Proper Clause, which the founding generation called the Sweeping Clause, grant general legislative powers to the national government. This clause contains two significant internal limitations. First, it only validates laws that “carry into Execution” other granted powers. To carry a law or power “into Execution” means to provide the administrative machinery for its enforcement; it does not mean to regulate unenumerated subjects in order to make the exercise of enumerated powers more effective. Second, and more fundamentally, laws enacted pursuant to the Sweeping Clause must be both “necessary and proper” for carrying into execution enumerated powers. ... [The word “proper” in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government—that is, consistent with background principles of separation of powers, federalism, and individual rights. Thus, the Sweeping Clause does not grant Congress power to regulate unenumerated subjects as a means of regulating subjects within its constitutional scope.
Nor does the power of the purse give Congress unlimited authority, though here the limits are a bit fuzzy. The Constitution contains a Taxing Clause, but it does not contain a “spending clause” as such. Nevertheless, Congress acquires the power to spend from two sources. First, the Sweeping Clause permits Congress to pass appropriations laws—provided that such laws “carry into Execution” an enumerated power and are “necessary and proper” for doing so. Second, ... Congress’s power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” seems to provide a general spending power. But a general power to spend is not a general power to regulate. Even if Congress can impose whatever conditions it pleases on the receipt of federal funds, those conditions are contractual in nature, a fact that limits both their enforceability and their scope. Moreover, it is not obvious that the Property Clause gives Congress wholly unlimited power to enact spending conditions, though identifying any limits on such power would require careful consideration of the meaning of the phrase “dispose of,” the relationship between the Property Clause and the Sweeping Clause, and the viability of a general doctrine of unconstitutional conditions.

Admittedly, some post-1789 amendments to the Constitution expand Congress’s powers beyond their original limits. For example, the Thirteenth and Fifteenth Amendments authorize Congress to enforce prohibitions against, respectively, involuntary servitude and racially discriminatory voting practices; the Fourteenth Amendment gives Congress power to enforce that Amendment’s numerous substantive constraints on states; and the Sixteenth Amendment permits Congress to impose direct taxes without an apportionment requirement. These are important powers, to be sure, but they do not fundamentally alter the limited scope of Congress’s power over private conduct.

The Death of the Nondelegation Doctrine

The Constitution both confines the national government to certain enumerated powers and defines the institutions of the national government that can permissibly exercise those powers. Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article II provides that “the executive Power shall be vested in a President of the United States of America.” Article III specifies that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The Constitution thus divides the powers of the national government into three categories—legislative, executive, and judicial—and vests such powers in three separate institutions. To be sure, the Constitution expressly prescribes some deviations from a pure tripartite scheme of separation, but this only underscores the role of the three Vesting Clauses in assigning responsibility for governmental functions that are not specifically allocated by the constitutional text.

Although the Constitution does not contain an express provision declaring that the Vesting Clauses’ allocations of power are exclusive, it is a mistake in principle to look for such an express declaration. The institutions of the national government are creatures of the Constitution and must find constitutional authorization for any action. Congress is constitutionally authorized to exercise “a ll legislative Powers herein granted,” the President is authorized to exercise “the executive Power,” and the federal courts are authorized to exercise “the judicial Power of the United States.” Congress thus cannot exercise the federal executive or judicial powers for the simple reason that the Constitution does not vest such
power in Congress. Similarly, the President and the federal courts can exercise only those powers vested in them by the Constitution: the general executive and judicial powers, respectively, plus a small number of specific powers outside those descriptions. Thus, any law that attempts to vest legislative power in the President or in the courts is not “necessary and proper for carrying into Execution” constitutionally vested federal powers and is therefore unconstitutional.

Although the Constitution does not tell us how to distinguish the legislative, executive, and judicial powers from each other, there is clearly some differentiation among the three governmental functions, which at least generates some easy cases. Consider, for example, a statute creating the Goodness and Niceness Commission and giving it power “to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.” If the “executive power” means simply the power to carry out legislative commands regardless of their substance, then the Goodness and Niceness Commission’s rulemaking authority is executive rather than legislative power and is therefore valid. But if that is true, then there never was and never could be such a thing as a constitutional principle of nondelegation—a proposition that is belied by all available evidence about the meaning of the Constitution. Accordingly, the nondelegation principle, which is textually embodied in the command that all executory laws be “necessary and proper,” constrains the substance of congressional enactments. Certain powers simply cannot be given to executive (or judicial) officials, because those powers are legislative in character.

A governmental function is not legislative, however, merely because it involves some element of policymaking discretion: it has long been understood that some such exercises of discretion can fall within the definition of the executive power. The task is therefore to determine when a statute that vests discretionary authority in an executive (or judicial) officer has crossed the line from a necessary and proper implementing statute to an unnecessary and/or improper delegation of distinctively legislative power. While I cannot complete that task here, the core of the Constitution’s nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them. Although this circular formulation may seem farcical, it recognizes that a statute’s required degree of specificity depends on context, takes seriously the well-recognized distinction between legislating and gap-filling, and corresponds reasonably well to judicial application of the nondelegation principle in the first 150 years of the nation’s history. If it does not precisely capture the true constitutional rule of nondelegation, it is a plausible first approximation.

In any event, it is a much better approximation of the true constitutional rule than is the post-New Deal positive law. The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935. This has not been for lack of opportunity. The United States Code is filled with statutes that create little Goodness and Niceness Commissions—each confined to a limited subject area such as securities, broadcast licenses, or (my personal favorite) imported tea. These statutes are easy kills under any plausible interpretation of the Constitution’s nondelegation principle. The Supreme Court, however, has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on. Anything short of the Goodness and Niceness Commission, it seems, is permissible.

The rationale for this virtually complete abandonment of the nondelegation principle is
simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions. Judicial opinions candidly acknowledge this rationale for permitting delegations. For example, the majority in Mistretta v. United States declared that “our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” When faced with a choice between the Constitution and the structure of modern governance, the Court has had no difficulty making the choice.

The Death of Separation of Powers

The constitutional separation of powers is a means to safeguard the liberty of the people. In Madison’s famous words, “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.

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. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.

This is probably the most jarring way in which the administrative state departs from the Constitution, and it typically does not even raise eyebrows. The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies. ....

WHAT IS TO BE DONE?

The actual structure and operation of the national government today has virtually nothing to do with the Constitution. There is no reasonable prospect that this circumstance will significantly improve in the foreseeable future. If one is not prepared (as I am) to hold fast to the Constitution though the heavens may fall, what is one supposed to do with that knowledge?
One option, of course, is to argue directly that the Constitution, properly interpreted in accordance with its original public meaning, is actually flexible enough to accommodate the modern administrative state. But although some of the claims I make ... with respect to Articles II and III may ultimately prove to be wrong in some important respects, the most fundamental constitutional problems with modern administrative governance—unlimited federal power, rampant delegations of legislative authority, and the combination of functions in administrators—are not even remotely close cases. ....

A second option is to insist that the administrative state can be reconciled with the Constitution if only we reject the methodology of original public meaning. I cannot enter here into a discussion of interpretative theory, but for those of us who believe that “a dash of salt” refers to some identifiable, real-world quantity of salt, originalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text.

...

There remains [another] option: acknowledge openly and honestly, as did some of the architects of the New Deal, that one cannot have allegiance both to the administrative state and to the Constitution. If, however, one then further follows the New Deal architects in choosing the administrative state over the Constitution, one must also acknowledge that all constitutional discourse is thereby rendered problematic. The Constitution was a carefully integrated document, which contains no severability clause. It makes no sense to agonize over the correct application of, for example, the Appointments Clause, the Exceptions Clause, or even the First Amendment when principles as basic to the Constitution as enumerated powers and nondelegation are no longer considered part of the interpretative order. What is left of the Constitution after excision of its structural provisions, however interesting it may be as a matter of normative political theory, simply is not the Constitution. One can certainly take bits and pieces of the Constitution and incorporate them into a new, hypothetical document, but nothing is fostered other than intellectual confusion by calling that new document the Constitution.

Modern champions of the administrative state, however, seem loathe to abandon the sheltering language of constitutionalism. But tactical considerations aside, it is not at all clear why this is so. Perhaps instead of assuming that the label “unconstitutional” should carry normative weight, the constitutional problems of the administrative state can lead us to ask whether it should carry any weight—with judges or anyone else. After all, the moral relevance of the Constitution is hardly self-evident.

And at that point, the humble lawyer must plead incompetence. Questions about the Constitution’s normative significance, as with all questions about how people ought to behave, are distinctively within the domain of moral theory. A legal scholar qua legal scholar can tell us, as a factual matter, that one must choose between the Constitution and the administrative state. He or she can tell us that the architects of the New Deal chose the administrative state and that that choice has been accepted by all institutions of government and by the electorate. But only the best of moral philosophers can tell us which choice is correct.