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Administrative Law's Grand Narrative

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Abstract

For many decades, administrative law has been clouded, or perhaps haunted, by a Grand Narrative. According to that narrative, the Supreme Court has abdicated. It has allowed the modern administrative state to breach the safeguards established by Article I, Article II, and Article III. The Court permitted the breach of Article I by authorizing Congress to delegate broad discretionary authority to agencies (and thus to become legislators). The Court permitted the breach of Article II by authorizing Congress to create independent agencies, immunized from presidential control. The Court permitted the breach of Article III in two ways: (1) by giving Congress broad authority to allow administrative agencies to engage in adjudication, unprotected by the Constitution's tenure and salary provisions and (2) by granting interpretive authority to such agencies. In recent years, the Court has acted as if the Grand Narrative is essentially right. Thus it has sharply cabined Congress' power to create independent agencies; imposed new constraints on Congress' power to allow agencies to adjudicate; signaled the vitality of the nondelegation doctrine; insisted on independent judicial interpretation of law; and invoked the separation of powers, through the major questions doctrine, to limit the exercise of discretionary power by agencies. The Grand Narrative also affects other areas of administrative law, including "arbitrary or capricious" review. There are other grand narratives about administrative law (originalist, Burkean, Thayerian, and pragmatic), and they might well be more compelling; but in the current era, they are not nearly as grand, or as influential, as the Grand Narrative. Law has multiple equilibria, and the current equilibrium, if it can be called that, is one in which the Grand Narrative is on the ascendency.

"[T]he dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands."[1]

"The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."[2]

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[1] *SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024).

[2] *FTC v. Ruberoid Co*., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

I. The Thesis

For many decades, administrative law has been haunted by a Grand Narrative.[3]

The Grand Narrative points to three transgressions, in the form of successive breaches of Article I, Article II, and Article III of the Constitution, all occurring in the first half of the twentieth century and motivated in part by the New Deal.[4] (So we are really speaking of three Grand Narratives, subsumed under one.) The Grand Narrative is the best way to understand a host of recent developments in administrative law. Those developments are an effort to restore a perceived status quo ante, in the form of an insistence on the perceived requirements of the three articles.

Article I vests legislative power in "a Congress of the United States."[5] According to the Grand Narrative, the grant of broad discretionary authority to the executive branch amounts to an impermissible transfer of legislative power.[6] After the New Deal and the Great Society, legislative power is broadly exercised by regulatory agencies.[7] It is true that in *Schechter Poultry*,[8] decided in 1935, the Court struck down a grant of open-ended authority, but the Court has *never* used the nondelegation doctrine to strike down an act of Congress since that year. In view of the sheer breadth of discretionary power regularly given to agencies, those who believe in the Grand Narrative think that the Court's forbearance is a palpable abdication of constitutional responsibilities. According to the Grand Narrative, the constitutional problem is that such agencies are effectively lawmakers: they have open-ended discretion to do as they wish and thus to make law.[9] An additional problem is that they can issue binding rules, when part of the definition of the legislative power, vested in Congress, is that it alone can issue binding rules.[10]

Article II vests executive power in "a President of the United States."[11] According to the Grand Narrative, the exercise of executive power by people who are free from plenary

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[3] For various versions, *see* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016); Jennifer L. Selin, *The Headless Fourth Branch*, 4 PERSPS. ON PUB. MGMT. AND GOVERNANCE 170 (2021); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV 1231 (1994); RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF ADMINISTRATIVE LAW (2020). For discussion of relevant issues, engaging with something like the Grand Narrative, *see* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV 421 (1987); JAMES FRIEDMAN, CRISIS AND LEGITIMACY (1980).

[4] For a vivid account, *see* DeMuth*, supra* note 3.

[5] U.S. CONST. art I, § 1.

[6] *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1288 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. (2023); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659 (2021); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Hamburger, *supra* note 3.

[7] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993).

[8] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[9] *See Gundy v. United States*, 588 U.S. 128 (2019) (Gorsuch, J., dissenting).

[10] *See* Hamburger, *supra* note 3.

[11] U.S. CONST. art II, § 1, cl. 1.

presidential control is impermissible.[12] The constitutional problem is that after the New Deal, the United States has seen the rise of a "headless fourth branch"[13] of government, consisting of independent officials, operating without presidential supervision and essentially on their own. The National Labor Relations Board, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, the Nuclear Regulatory Commission, the Consumer Product Safety Commission, and many more – according to the Grand Narrative, these are constitutional barnacles, an institutional innovation foreign to the constitutional structure. Or perhaps they are constitutional parasites, burrowing from within to undermine fundamental constitutional commitments.

Article III vests judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[14] Federal judges are given important protections of independence; thus federal judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[15] The constitutional problem is that after the New Deal, the United States has seen the rise of a large system of adjudication, or many systems of adjudication, consisting of judges who are not Article III judges.[16] All this is a patent violation of the structural commitments embodied in Article III.[17]

According to the Grand Narrative, the situation is worse still. Administrative agencies do not merely exercise authorities in defiance of Article I, II, and III. They also *combine* traditionally separated functions.[18] Many executive agencies do not merely execute the law; they also make it, and to make matters worse, they adjudicate. Many independent agencies do not only make law and adjudicate; to make matters worse, they also execute it, free from presidential control. Nothing in the Constitution permits all this.[19]

My purposes in this Essay are to outline the Grand Narrative, to establish its important and mounting role in current administrative law, and to sketch, briefly and lightly, what might be wrong with it, in part by identifying competing narratives. In its current form, the Grant

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[12] Aditya Bamzai and Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1758 (2023); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL. L. REV. 1021 (2006).
[13] *See* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2033 n.332 (2019) ("[The] headless 'fourth branch' of government consists of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either." (alteration in original) (quoting *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 886 (3d Cir. 1986))); *Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) ("The collection of agencies housed outside the traditional executive departments . . . is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence."); *See also FTC v. Ruberoid Co*., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), referring to "a veritable fourth branch of the Government, which has deranged our three-branch legal theories."
[14] U.S. CONST. art III, § 1.
[15] *Id.*
[16] *See, e.g*., Harold Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE WES. RES. L. REV. 1083 (2015).
[17] *See* RICHARD EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).
[18] Hamburger, *supra* note 3.
[19] *See* Philip Hamburger, *Chevron Bias*, 84 G.W. L. REV. 1187 (2016). It might be noted parenthetically that Chief Justice Roberts has a tendency to write opinions with distinctive narratives of the arc of the law; he is exceptionally skilled at it. *See, e.g., Seila Law LLC. v CFPB*, 591 U.S. 197 (2020); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

Narrative is an originalist narrative, but all or part of it might be wrong on originalist grounds, and originalism might be wrong. It is important to say that this is mostly a descriptive enterprise, not a normative one.[20] I aim to outline the Grand Narrative and to bring it to the surface,[21] not to praise it (and candor compels an acknowledgement that I would prefer to bury it[22]). In saying that the approach sketched here is the Grand Narrative, I mean to emphasize its current centrality, not its validity. In the past, other narratives counted as grand,[23] and something similar will almost certainly be true of the future.

II. Abdication

As the Grand Narrative has it, the New Deal was the defining period for the successive breaches of Articles I, II, and III,[24] but things got much worse in the 1960s and 1970s, and there have been very bad moments since that time.[25] A central reason was capitulation, or abdication,[26] by the Supreme Court. For Article II, *Humphrey's Executor*,[27] upholding the existence of independent agencies, is the defining decision, though a number of later rulings ratified and compounded the error.[28] For Article III, *Crowell v. Benson*,[29] allowing administrative adjudication, was the moment of constitutional abdication, though here too later rulings made a terrible thing even worse.[30] For Article I, no single decision stands out, but a series of rulings allowed Congress to grant open-ended discretion to agencies, so long as it provided an "intelligible principle"[31] -- which need not be so intelligible, and which need not really count as a

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[20] There is also an important question, not explored here, that might fall under the broad category of legal sociology: Why has the Grand Narrative become, well, grand, in the current period? Why do some justices seem to embrace it? A realist answer would emphasize that they like it, which is undoubtedly true, but far too simple. We would have to speak as well in terms of social movements, network effects, judicial appointments, informational cascades, epistemic communities, and group polarization. *See* CASS R. SUNSTEIN, HOW TO BECOME FAMOUS (2024); the Grand Narrative has become famous through the same mechanisms discussed there.

[21] Mill gave one reason: "He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion." JOHN STUART MILL, ON LIBERTY (1859).

[22] *See* Cass R. Sunstein, *Epistemic Communities in American Public Law*, 1 POL. PHIL. (2024), available at https://politicalphilosophyjournal.org/article/id/16684/

[23] Here are three: Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); JERRY MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY (2018); CASS R. SUNSTEIN AND ADRIAN VERMEULE, LAW AND LEVIATHAN (2020). As they say, the owl of Minerva flies only at dusk. Maybe it is dusk. We should hope so. (For a night-flying owl, *see* JOHN HART ELY, DEMOCRACY AND DISTRUST (1981).)

[24] *See* Douglas Ginsburg, *On Constitutionalism*, CATO SUPREME COURT REVIEW 1, 17 (2003)

[25] *See Gundy v. United States*, 588 U.S. 128 (2019) (Gorsuch, J., dissenting).

[26] *See* Ginsburg, *supra* note 24.

[27] 295 U.S. 602 (1935).

[28] *Wiener v. United States*, 357 U.S. 349 (1958).

[29] 285 U.S. 22 (1932). The best discussion remains Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

[30] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985). The Seventh Amendment analogue, a clear target of the Grand Narrative, is *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

[31] *See*, e.g., *Touby* v. *United States,* 500 U.S. 160 (1991); *Industrial Union Dept., AFL—CIO* v. *American Petroleum Institute,* 448 U.S. 607 (1980).

principle.[32] We might see *American Trucking*[33] as the closest thing to *Humphrey's Executor* and *Crowell*, insofar as it can be read to say: "if Congress tells an agency to do whatever it thinks best, we will not stand in the way."[34] As the Court (startlingly?) put it in upholding a seemingly broad grant of discretion ("requisite to protect the public health with an adequate margin of safety"):

> "In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." We have approved the wartime conferral of agency power to fix the prices of commodities at a level that" 'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of thee] Act.'" And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "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."[35]

For many decades, the Grand Narrative lurked in the shadows of administrative law – menacing perhaps, but essentially harmless. It was a presence, a ghost, or perhaps a zombie (alive, kind of, but mostly dead). It might have been taught in law schools, but in the federal courts, the real action lay elsewhere -- in more mundane kinds of things, such as challenges to agency action as arbitrary or capricious.[36] Those who invoked the Grand Narrative were hardly silent, but they were marginalized. A nondelegation challenge to a federal statute was essentially doomed, the last refuge of scoundrels.[37] *Humphrey's Executor* was settled law, and however narrowly it might have been understood when written, it was taken to remove constitutional doubts about independent agencies of multiple kinds.[38] To be sure, there were continuing disputes about the relationship between Article III and agency adjudication, but they were at the margins and quite arcane.[39] For those who embraced the Grand Narrative, the fundamentals of administrative law had been settled, and settled quite wrongly. The Constitution was lost, or perhaps in exile.[40] That situation might have turned out to be stable and enduring.

III. The Grand Narrative In Practice

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[32] *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457 (2001).
[33] *Id*.
[34] *Id*. at 474.
[35] *Id.* at 474 (internal citations omitted).
[36] *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).
[37] *See Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457 (2001).
[38] *See Bowsher v. Synar*, 478 U.S. 714, 725-26 (1986).
[39] *See, e.g*., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985); *Stern v. Marshall*, 564 U.S. 462 (2011).
[40] *See* Ginsburg, *supra* note 24l; Randy Barnett, Restoring The Lost Constitution (2013).

But life is full of surprises. The Grand Narrative is now animating the largest developments in the field.

A. The Unitary Executive

Begin with Article II, where *Humphrey's Executor* is on the run. In two cases, the Court seized on plausible but far-from-obvious distinctions to strike down statutes providing for agency independence. In *Free Enterprise Fund*,[41] the Court displayed grave dissatisfaction with the very idea of independent agencies. It began dramatically and in a way that introduced some central themes of the Grand Narrative[42]:

> "Our Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U. S. 919, 951 (1983). Article II vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; id., § 3. In light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939). Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary."

Those ideas leave no room for independence. And while the Court did not reject its precedents on that count, it was evidently uncomfortable with them. "The parties do not ask us to reexamine any of these precedents, and we do not do so."[43] Technically invalidating two layers of independence without questioning one, the Court said that dual layers would compromise the President's authority under the Take Care Clause: "We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them."[44] In *Free Enterprise Fund*, a major part of the Grand Narrative is embraced; it exerts immense gravitational force.

In *Seila Law*,[45] the Court held that while a multimember independent agency is constitutional, a single-headed commission is not. Thus the Court struck down the statute creating the Consumer Financial Protection Bureau insofar as it granted independence to the Bureau's Director. A central part of the Grand Narrative appeared even more clearly there, where the Court emphasized that Article II creates a strongly unitary executive branch:

> "Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; id., §3. . .

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[41] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477 (2010).
[42] *Id*. at 483.
[43] *Id.*
[44] *Id.* at 484.
[45] *Seila Law LLC*. v CFPB, 591 U.S. 197 (2020).

> The President's power to remove—and thus supervise— those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U. S. 52 (1926)."[46]

In that short passage, the Court plainly embraced the Grand Narrative with respect to Article II. In the Court's view, the text of the Constitution creates a strongly unitary executive, giving the president unrestricted removal authority. That understanding was essentially settled by the Decision of 1789.[47] Any departure from the constitutional settlement is impermissible. In embracing that understanding, the Court dramatically limited its previous cases recognizing congressional authority to restrict the president's removal authority – and at least in its analysis, may have turned *Humphrey's Executor* into a near-cipher. It recognized just "two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."[48] In the Court's account, these exceptions "'represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'"[49]

Let us pause over those sentences. For present purposes, the key exception is for "multimember expert agencies that do not wield substantial executive power." That phrase encompasses a truly minimalist understanding of *Humphrey's Executor* – one that was, to be sure, consistent with the understanding at the time. In *Humphrey's Executor*, the FTC was taken by the Court to have "quasi-judicial" authority in the specific sense that it could find facts, which would then be presented to courts in an enforcement proceeding. As the Supreme Court understood matters in 1935, the FTC was acting a lot like a special master.[50] Unlike a court, it did not have the authority to issue orders, after an adjudication, whose violation would result in sanctions. In addition, the FTC was required by law to make reports and recommendations to Congress, and in that specific sense, it was taken by the Court as a "quasi-legislative" body.[51] The FTC was not understood, in 1935, to have rulemaking authority.[52] In that sense, *Humphrey's Executor* was, in its time, a narrow holding. As the Court then saw it, the FTC had exceedingly limited powers, and was not in any sense exercising executive authority.[53]

In the coming decades, *Humphrey's Executor* came to be understood far more broadly.[54] It was widely taken to validate modern independent agencies, which make rules and engage in a

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[46] *Id.* at 203-04.
[47] *See* Prakash, *supra* note 12.
[48] *Seila Law LLC*. v CFPB, 591 U.S. 197, 218 (2020).
[49] *Id.*
[50] *Humphrey's Executor v. United States,* 295 U.S. 602, 628 (1935). ("Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." Id. at 628.
[51] "In making investigations and reports thereon for the information of Congress under 6, in aid of the legislative power, it acts as a legislative agency.").
[52] *See Nat'l Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).
[53] *Humphrey's Executor v. United States,* 295 U.S. 602, 628 (1935) ("The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.").
[54] *See* Geoffrey Miller, *Independent Agencies*, 1986 SUP CT REVIEW 41 (1986).

number of (other) executive functions.[55] In these circumstances, *Seila Law* can be seen as a thunderclap. Many independent agencies, including the SEC, the FCC, the Nuclear Regulatory Commission, and the National Labor Relations Board, "wield substantial executive power," if only because they promulgate regulations. Do they fall outside the "exception" recognized in *Humphrey's Executor*? That would be a radical conclusion, consistent with the Grand Narrative -- and *Seila Law* leaves it open.

B. "To Say What the Law Is"

Insofar as it involves Article III, the Grand Narrative has several locations.

1. Marbury

One involves the allocation of interpretive authority as between courts and agencies. In *Chevron v. NRDC*,[56] of course, the Court ruled that if Congress has not spoken clearly or directly, judges should uphold agency interpretations of law, so long as those interpretations are reasonable. Chevron was characterized by some as "a counter-*Marbury* revolution, one at war with the APA, time honored precedents, and so much surrounding law."[57] In rejecting *Chevron*, *Loper Bright* relied on section 706 of the APA, which states in relevant part that "court must decide all relevant questions of law."[58] At the same time, the Court spoke grandly. It repeatedly drew attention to Article III and *Marbury v. Madison*:

> "The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches. This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is.""[59]

In its return to constitutional fundamentals, *Loper Bright* sounds a lot like *Seila Law*. The Court added: "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment." It is easy to see *Loper Bright* as reflecting the Grand Narrative insofar as it can be taken to assert, and reclaim, judicial authority in the interpretation of federal law.

2. "Public Rights" Cabined

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[55] *Wiener v. United States*, 357 U.S. 349 (1958).
[56] 467 U.S. 837 (1984).
[57] *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2289 (2024) (Gorsuch, J., concurring).
[58] 5 U.S.C. 706.
[59] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (internal citations omitted).

What about *Crowell*? That decision had a number of components. In private rights cases, the Court held, administrative tribunals could find facts subject to deferential review, except for jurisdictional and constitutional facts, where de novo review was required.[60] *Crowell* added that administrative tribunals could find facts in "public rights" cases without review by Article III courts. The *Crowell* Court defined private rights cases as those involving "the liability of one individual to another under the law as defined."[61] The Court also said that a matter of public right is one "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[62] That statement launched an ornate body of law, raising the question whether a "public right" case might be found whenever the government was a party (thus simplifying a number of Article III problems), or whether a "public right" might exist when the relevant right was created by Congress. The cases on this point were exceedingly complicated, and there have been many fluctuations.[63]

In *Jarkesy*, however, the Court, evidently motivated by the Grand Narrative, dramatically narrowed the public rights exception. It points to "historic categories of adjudications" that "fall within the exception, including relations with Indian tribes, the administration of public lands, and the granting of public benefits such as payments to veterans, pensions, and patent rights."[64] That is a list, not a theory. Whatever happened to the idea that a matter of public right is one "between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"?

The basic point is that with the Grand Narrative in mind, the *Jarkesy* Court was plainly uncomfortable with a long train of decisions involving both Article III and the Seventh Amendment. It fundamentally recast, and narrowed, the public rights exception. It did not overrule *Crowell*, to be sure, or even question it, but Justice Gorusch made his own views plain, writing "To get there [in *Crowell*] took a dash of fiction and a pinch of surmise."[65] Thus "the Court embraced the fiction that Executive Branch officials might similarly act as assistants or adjuncts to Article III courts. . . . Almost in a blink. . . more and more agencies began assuming adjudicatory functions previously reserved for judges and juries, employing novel procedures that sometimes bore faint resemblance to those observed in court."[66] A clearer statement of the Grand Narrative would be hard to find.

C. Lawmaking

1. Intelligible Principles

[60] *Crowell v. Benson*, 285 U.S. 22 (1932).
[61] *Id.* at 51.
[62] *Id.* at 50.
[63] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985).
[64] *SEC v. Jarkesy*, 144 S. Ct. 2117, 2133 (2024) (internal citations omitted).
[65] *Id.* at 2148 (Gorsuch, J., concurring).
[66] *Id.*

In *Gundy v. United States*,[67] the Court was asked to use the nondelegation doctrine to strike down a grant of discretion to the Attorney General. The Court declined the invitation, construing the relevant statute so as to avoid the nondelegation problem.[68] In dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, offered a large-scale attack not only on the majority's analysis, but also on the decades of law since *Schechter Poultry*.[69] Here is a flavor:

> "If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense." Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue."[70]

Invoking what he saw as the plain meaning of Article I, section 1, Justice Gorsuch urged that the "intelligible principle" test had become no test at all, and that the Court should abandon it or discipline it with a new and stricter test.[71] Justice Alito did not join Justice Gorsuch, but he expressed clear dissatisfaction with the state of the law: "Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[72] It is worth pausing over those sentences. Justice Alito clearly expressed dissatisfaction *with an approach taken for 84 years*. He was speaking favorably of a central aspect of the Grand Narrative.

2. Major Questions

Turn in this light to the major questions doctrine, as the Court calls it, which holds that agencies may not make certain "extraordinary decisions" without clear congressional authorization.[73] The major questions doctrine is impossible to understand without reference to the Grand Narrative.

As the Court has explained it, the major questions doctrine has clear roots in the separation of powers and more specifically the nondelegation doctrine. The basic idea is that certain decisions, large or transformative, require unambiguous congressional authorization.

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[67] 588 U.S. 128 (2019).
[68] *Id.*
[69] *Id*. (Gorsuch, J., dissenting).
[70] *Id.* at 155-56
[71] *Id.* at 163-64
[72] *Id.* at 148-49.
[73] *West Virginia v. EPA*, 597 U.S. 697 (2022).

Agencies cannot make such decisions without that authorization. As the Court put in *West Virginia v. EPA*,[74] "In certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[75] Let us underline the term "separation of powers" in that passage, which points to the Grand Narrative.

Justice Gorsuch is particularly taken with the Grand Narrative, and in his view, the major questions doctrine has everything to do with the nondelegation doctrine.[76] According to Justice Gorsuch, the doctrine is a clear-statement principle, akin to the presumption against retroactivity and the presumption against abrogation of sovereign immunity.[77] Clearly invoking the Grand Narrative, Justice Gorsuch urges that "Article I's Vesting Clause has its own [clear-statement principle]: the major questions doctrine."[78] As he puts it, "The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'"[79] The goal of the doctrine is thus to ensure congressional primacy by avoiding a situation in which agencies exercise authority that the national legislature has not clearly granted them. On this view, the major questions doctrine is best understood as a nondelegation canon, akin to the presumption against retroactivity. Because Article I is central to the doctrine, we are clearly seeing the Grand Narrative in action.

IV. Counternarratives

The Grand Narrative is immensely powerful. One reason is its simplicity. It is easy to grasp. You can get it instantly. Another is its narrative resonance: It is a familiar tale of a rise (the founding),[80] a fall (the New Deal),[81] and a possible redemption.[82] It has energy and a charge. It sits on a high horse. To its defenders, it has firm roots in the Constitution itself. Anyone who reads the document will not like the idea of a headless fourth branch of government – or of lawmaking by the executive branch, execution by people immunized from presidential control, or adjudication by people lacking the safeguards of Article III. The idea of a "headless fourth branch" is blunt, direct, and memorable. Indeed, the Grand Narrative is now animating not only those aspects of administrative law; it also helps to explain the recent intensification of judicial review of agency action in many domains, including above all arbitrariness review.[83]

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[74] *Id.* at 723.
[75] *Id.*
[76] *Id.* at 736-53 (Gorsuch, J., concurring).
[77] *Id.*
[78] *Id.* at 740.
[79] *Id.* at 742 (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010)).
[80] Or in the terms of Star Wars, *A New Hope*.
[81] *The Empire Strikes Back*.
[82] *The Return of the Jedi* (as if you needed to be told).
[83] *See Dep't of Homeland Security v. Regents of UC*, 591 U.S. 1 (2020). There is an unmistakable trend in the direction of aggressive judicial review of agency action, fueled (I think) by the Grand Narrative. *See* Donald Goodson et al., *Major Rules in the Courts* (2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4819477.

But none of this is meant to suggest that the Grand Narrative is correct. For some people, it is snake oil.[84] It might be snake oil because it is wrong on its own premises; it might be snake oil because its premises are wrong. We can imagine four kinds of rebuttals, and each can produce a narrative of its own (if perhaps not quite so grand). Note here that the Grand Narrative consists of three grand narratives, and each must be taken on its own terms. It would be possible, for example, to think that the Grand Narrative is correct with respect to Article III, but that it is false with respect to Article I and Article II. Let us now turn to the four rebuttals.

(1) *Originalism*. The rise of the Grand Narrative is closely associated with the rise of originalism in constitutional law, and hence it is natural and appropriate to evaluate it in originalist terms. Does it fit the original public meaning[85]? To answer that question, the Grand Narrative must be assessed carefully, in historical terms and area-by-area. Some parts of the Grand Narrative are more plausible than others, and I restrict myself to a few brief notes here. Mounting historical work suggests that from the originalist standpoint,[86] the idea of a "nondelegation doctrine," understood as a ban on the grant of open-ended discretionary power, may well be a myth[87] – perhaps even a concoction of the twentieth century.[88] In other words, the mounting work raises the possibility that the nondelegation doctrine, so understood, is inconsistent with the original public meaning of the founding document. If so, we are speaking of something like an invented tradition[89] or the construction of memory.[90]

A great deal of evidence shows that the founding generation simply did not believe that the Constitution limited Congress's power to grant open-ended discretion to others, including the executive branch.[91] If so, the original public meaning of Article I, section 1 may not support the nondelegation doctrine as Justice Gorsuch (for example) understands it. On a more cautious view, the founding generation was comfortable with broad grants of discretion, and the original

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[84] *See* Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021). I count myself as part of Camp Burkeanism and Camp Pragmatism, but I only sketch, and do not defend, my view here.

[85] Mortenson and Bagley, *supra* note 84, offer a vivid argument that it does not, at least insofar as we are speaking of the nondelegation doctrine.

[86] I am bracketing some questions about how to identify the original public meaning.. For defining discussions, *see* Lawrence Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2017)

[87] *See* Mortenson and Bagley, *supra* note 84; Eric Posner and Adrian Vermeule*, Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021).

[88] *See* Keith Whittington and Jason Iuliano, *The Myth of The Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017); Mashaw, *supra* note 23, at 5 ("From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.").

[89] See The Invention of Tradition (Eric Hobsbawm and Terrence Ranger eds. 1992).

[90] MAURICE HALBWACHS, ON COLLECTIVE MEMORY 234 (1992 ed.).

[91] Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding: A Response to Critics*, 122 COLUM. L. REV. 2323 (2022); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 248 (2021); Chabot, *supra* note 87 at 87–88; Parrillo, *supra* note 87 at 1302 (2021); Whittington and Iuliano*, supra* note 88.

public meaning did not forbid them, even if we cannot say that an entirely open-ended grant would have been deemed permissible. In other words, the existence of some nondelegation doctrine, banning that kind of grant, is not ruled out, but the Grand Narrative gets the original public meaning wrong insofar as it suggests that Article I, section forbids Congress from giving agencies the kinds of discretion that they currently enjoy.[92]

In addition, there is some compelling historical evidence that from the originalist standpoint,[93] the argument in favor of unrestricted removal power may also be a myth – perhaps another concoction of the twentieth century, not the eighteenth. Within the founding generation, many people believed that Congress could limit the president's removal power over high-level employees, including (some) principal officers.[94] Contrary to the Grand Narrative, the Decision of 1789 is mysterious, not straightforward. If we count the votes, what happened in 1789 seems to undermine the Grand Narrative, rather than support it, though the evidence is not entirely clear.[95]

With respect to Article III, we can find considerable historical support for the view that Congress may grant at least some adjudicatory functions to agencies.[96] *Crowell* itself might turn out to be defensible on originalist grounds. At the same time, *Jarkesy* might well have gotten the public rights exception, well, right, because the Court seems to have captured longstanding practice with respect to the permissible categories of exclusion from federal courts.

Final conclusions would require extended analysis. But it might well follow that some (not all) of the Grand Narrative should be seen as a form of living constitutionalism, dressed up in founding era garb, which really does not fit. The originalist counternarrative, based on some meticulous historical work, sees important parts of the Grand Narrative as an invention. Of course a great deal more would have to be said to evaluate that conclusion.

(2) *Burkeanism*. If we are not originalists, or if we do not credit the historical evidence against the Grand Narrative, we might nonetheless reject it on Burkean grounds.[97] Burke's key claim is that the "science of constructing a commonwealth, or reforming it, is, like every other experimental science, not to be taught a priori."[98] To make this argument, Burke opposes theories

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[92] This is a plausible reading of Mortenson and Bagley, *supra* note 84; Mortenson and Bagley, *supra* note 89; and Parillo, *supra* note 87.

[93] To be sure, there is a question here about the right conception of originalism; I will turn to that question below.

[94] Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U PA. L. REV. 753 (2023); JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012); Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism,* 33 YALE J. L. & HUMANS. (2022); Jed H. Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022);

[95] Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U PA. L. REV. 753 (2023), strongly supports the view that the majority in Congress did not believe that the Constitution granted the president plenary removal authority.

[96] *See* Krent, *supra* note 16; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

[97] On Burkeanism, *see* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 253 (2006).

[98] Edmund Burke, *Reflections on the Revolution in France*, in THE PORTABLE EDMUND BURKE 416, 456-57 (Isaac Kramnick ed., 1999).

and abstractions, developed by individual minds, to traditions, built up by many minds over long periods. In a particularly vivid passage, Burke writes[99]:

> We wished at the period of the Revolution, and do now wish, to derive all we possess as *an inheritance from our forefathers....* The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution than any man ought to venture upon pulling down an edifice which has answered in any tolerable degree, for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.

In the context of constitutional law, contemporary Burkeans urge that judges should interpret ambiguous constitutional provisions by close reference to longstanding practices. Recall Justice Alito's words: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[100] A committed Burkean would not like that at all.

If we are faithful Burkeans, we would think it exceedingly important that for many decades, agencies have been allowed to exercise broad discretionary power; that independent agencies have been allowed to exist; and that agencies have been permitted to exercise adjudicatory power, subject to a host of constraints. Rejection of the Grand Narrative, for better or for worse, has been woven into the fabric of American institutions. Accepting that narrative, decades into the twenty-first century, would be a kind of hubris – an overhaul of established institutions by those in the grip of a theory. That would be arrogant and wrong. The Burkean counternarrative sees the Grand Narrative as a kind of French Revolution.

It is true that there are Burkeans and there are Burkeans. Some Burkeans might see the New Deal as the real French Revolution, and the Grand Narrative as an effort to undo it, in favor of the longstanding tradition. This would be a Burkean counter-counternarrative, suggesting that the Grand Narrative is a restoration. A great deal of work would be necessary to vindicate this position, and it might well be a matter of motivated history; but still.

(c) *Thayerism*. In the late nineteenth century, James Bradley Thayer argued in favor of a sharply limited role for courts in a democratic society.[101] He urged that in the face of a constitutional challenge, all reasonable doubts should be resolved favorably to Congress, in the sense that the Constitution should be interpreted in a way that gives the political process maximum room to maneuver.[102] In a crucial passage, Thayer said that "such questions require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical

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[99] *Id.*
[100] *Gundy v. United States*, 588 U.S. 128, 149 (2019)
[101] *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For a valuable discussion of Thayer's motivations, emphasizing what he sees as Thayer's political conservatism and desire to activate political focus on combating ill-considered progressivism, is *see* generally Mark Tushnet, *Thayer's Target: Judicial Review or Democracy*?, 88 NW. U. L. REV. 9 (1993).
[102] *See* Thayer, *supra* note 99, at 129.

judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot."[103]

Under the right approach, "an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest *as to leave no room for reasonable doubt*."[104] Thayer urged that this idea was established "very early" and in fact became entrenched by 1811.[105] What was necessary, for invalidation, was "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."[106] As Thayer put it, courts "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, - so clear that it is not open to rational question."[107]

With these words in mind, Thayerians would reject the Grand Narrative on the ground that it neglects the fact that the answers it gives are hardly "not open to rational question." In the face of "reasonable doubt," courts should step aside. The Thayerian counternarrative, celebrating judicial respect for congressional choices, sees the Grand Narrative as fatally undemocratic.

(4) *Pragmatism*. Suppose we believe that the best approach to the U.S. Constitution understands the document as something that should endure over time, and that should have the flexibility to accommodate new circumstances and exigencies.[108] On that view, Congress ought to be given room to adopt institutional arrangements that are, in its view, necessary or appropriate.[109] Those who believe in a pragmatic approach to constitutional interpretation need not be Burkeans; the fact that an innovation is new, rather than old, is not determinative. Nor need they be thoroughgoing Thayerians. They would simply emphasize that the Constitution has

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[103] *Id.* at 135.
[104] *See id.*, at 140 (quoting *Com. v. Smith*, 4 Bin 117 (1811)). Note that this claim is not the same as the "rational basis" test for reviewing legislation. The rational basis test is rooted in *the Court's independent interpretation* of the requirements of various constitutional provisions; in the Court's view, what is required is a rational basis (no more and no less). The Court does not say that it adopts the rational basis test because on Congress' view of the Constitution, that test is the right one.
[105] *Id.* at 140.
[106] *Id.* at 141.
[107] *Id.* at 144.
[108] The obligatory citation, and the right one, is *McCulloch v. Maryland*, 17 U.S. 316 (1819), and of course:

> In considering this question, then, we must never forget that it is *a Constitution* we are expounding. . . . The subject is the execution of those great powers on which the welfare of a Nation essentially depends. It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

[109] DAVID EPSTEIN AND SHARYN O'HALLORAN, DELEGATING POWERS (1999).

to be workable, and that so long as we do not have plain defiance of constitutional restrictions, courts ought not to stand in the way.[110]

The questions remain, of course, whether broad grants of discretion are a defiance of Article I; whether the independent agency form is a defiance of Article II; and whether administrative adjudication is a defiance of Article III. Pragmatists would be inclined to say "no" to all of these questions. Their own counternarrative, protective of the institutional initiatives that have produced the modern administrative state, sees the Grand Narrative as reckless and clueless.[111] They think that it is built on sand. They think that it smells of the lamp.

V. Conclusion

It is not possible to understand contemporary administrative law without reference to the Grand Narrative. The foundations of longstanding law have been shaken. *Chevron* is overruled. Rooted in an understanding of the separation of powers, the major questions doctrine is an anti-*Chevron* principle, holding that in important cases, ambiguous statutes must be interpreted to cabin agency authority. The nondelegation doctrine is no longer a dead letter. *Seila Law* can be taken to say, "go forth and sin no more," or instead to threaten the independent agency form more broadly. The public rights exception has been radically narrowed.

True, we cannot say that *Humphrey's Executor*, *Crowell v. Benson*, and *American Trucking* have been overruled. But we can say that both *Humphey's Executor* and *Crowell* have been sharply limited, and no one should be amazed if the nondelegation doctrine is used, in the near future, to invalidate federal legislation.

There are strong reasons to question the Grand Narrative. Its roots in the original public meaning are not secure. Some alternative narratives, or counternarratives, are better. If the Grand Narrative continues to be invoked to uproot the fabric of administrative law, it will inaugurate something like a legal revolution, reflecting what (in my view) would have to be called a form of judicial hubris. But for the moment, let us step back a bit. The outsized and apparently growing role of the Grand Narrative in current administrative law attests to the unpredictability of law's arc, and to the existence of multiple equilibria.[112]

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[110] For different accounts, *see* Eric MacGilvray, *Liberal Freedom, the Separation of Powers, and the Administrative State*, 38 SOC. PHIL. AND POL'Y. 120 (2021); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L., ECON., AND ORG. 81 (1985); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2018); Epstein and O'Halloran, *supra* note 107.

[111] We could imagine a pragmatist counter-counternarrative, claiming that the administrative state has been a failure in multiple and that the Grand Narrative, without or not vindicated by history, is a way of vindicating high-level constitutional principles under dramatically changed circumstances. An argument in that general direction can be found in Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1 (1994).

[112] *Cf.* Timur Kuran, *The Inevitability of Future Revolutionary Surprises*, 100 AM. J. SOCIOLOGY 1528 (1995).