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THE CHALLENGES OF FITTING PRINCIPLED MODERN GOVERNMENT –
A UNIFIED PUBLIC LAW – TO AN EIGHTEENTH CENTURY CONSTITUTION

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"The Challenges of Fitting Principled Modern Government – a Unified Public Law – to an Eighteenth Century Constitution"

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The papers presented at a fall 2016 conference at Cambridge University, The Unity of Public Law?, generally addressed issues of judicial review in the UK, Canada, Australia and New Zealand, often from a comparative perspective and the view that unifying impulses in “public law” arose from the common law. Accepting what Justice Harlan Fisk Stone once characterized as the ideal of “a unified system of judge-made and statute law woven into a seamless whole by [judges],” The Common Law in the United States,” 50 Harvard L Rev 4 (1936), this paper considers a variety of issues that have complicated maintaining the unity of public law under our written Constitution: executive discretion; interpretive styles, variations in “due process”; the Constitution’s failure to define our government and resulting variation in its institutions; the resulting difficulty in accommodating “separation of powers”; issues of presidential role; and the place of “deference” in accommodating uniform national administration of law in the face of the geography of our essentially final circuit courts.

Twelve years ago, the conveners of a conference on an important decision of the Canadian Supreme Court, *Baker v. Canada (Minister of Citizenship and Education)*¹ published its proceedings under the title you have chosen for this one, “The Unity of Public Law.”² That case concerned a public law issue that is very much alive in my country today, as indeed it is in many countries: the relationship, if any, between judicial responsibility for assuring the integrity of the rule of law, on the one hand, and executive discretion concerning issues of national security, in association with questions of immigration and lawful residence, on the other. To quote editor Dyzenhaus, “As Gerhard Anschutz, Weimar’s most distinguished constitutional lawyer said, it might seem that in these areas, ‘Here, public law stops short.’” (At 2) “[F]or positivist judges there is no intrinsic unity to public law and no tension arises when constitutionally or legislatively ordained values apply to one group, say citizens, but not to another, say, non-citizens.” (At 4) Some American legal scholars, in the current parlous circumstances, suggest that for us, too, executive discretion in these areas lies beyond the reach of the judiciary.³ The question prompted by *Baker* was whether, rather, “discretion must be exercised in accordance with the boundaries imposed [by] statute, the principles of the rule of law, the principles of administrative law, the fundamental values of ... society, and the principles of the [nation’s constitutional law].” (Ibid)⁴

That conference, like this one, drew participants from common law nations – albeit, there, the United States was among the missing. Perhaps the reason for America’s absence was that its focus was, as Prof. Michael Taggart put it (at 457) on “common law constitutionalism” as a

¹ [1999] 2 SCR 817.

² David Dyzenhaus, ed. (Hart Publishing 2004).

³ Adrian Vermeule, Our Schmittian Administrative Law, 122 Harvard Law Review 1095 (2009).

⁴ Here, quoting Baker, para 56, with the quotation here altered to remove its specifically Canadian elements.

means of accommodating domestic and international public law, since constitutionalism in the United States is not, or at least does not admit to be, “common law” constitutionalism. We have a *written* constitution, and while there remain fierce battles over its interpretation, they are not generally put in those terms. Of course one might think they should be – the incapacity of simple legislation to override the Court’s judgments about the Constitution’s meaning entails that American constitutional law emerges essentially as the common law does, through the accretion of judicial precedent. And one might find in the battles between “originalists,” and those who espouse greater freedom from text and a “living” document, resemblances to the struggles between Austinian legal positivists and those who would place laws’ underlying authority outside the State. Nor have international law or the views of foreign courts often informed its judgments, despite cogent argument that they should and the increasing importance of transnational actors.⁵

For the United States, then, the formal possibilities of coherence in public law inhere, first, in its written Constitution – self-declared as dominant in relation to any other possible source of national law – and, second, in the single national Supreme Court that Constitution establishes to resolve cases and controversies respecting national law, a Court that has long insisted that it is the final arbiter of the Constitution’s meaning. Informally, one might say comprehensible coherence also emerges from the practical necessities of a single legal profession serving the whole of the public, to avoid unsustainable specialization in matters of great importance, with its accompanying threats of loss of political control and access by both ordinary citizens and their lawyers, and reduction in the possibility of understanding and effective control by courts, legislatures, or the chief executive. From the perspective of maintaining effective rule of law control over governmental actions, comprehensible coherence is essential.⁶

In considering how I might best contribute to this conference, I was moved both by this difference, and by my own capacities. While coherence with international law, whether the problems created in relation to international human rights standards, the World Trade Organization, the North American Free Trade Agreement, or the International Court of Criminal Justice, presents increasingly important challenges, they are ones beyond my expertise. And the arguably unified American *domestic* public law it makes most sense to address is that at the national level. Even at the domestic level, the US does not have “a single sovereign law-maker within a single sovereign nation-state” (at 460) as orthodox positivism presupposes. In the American federal union, each state is in an important sense sovereign, entitled to its own legal regime so long as that regime meets the strictures of the national constitution. There is thus inevitable incoherence from state to state, particularly in respect of private law, but also in structural arrangements and the law attending them. Here, the governor is entitled to choose a single word or phrase or section from a legislative enactment for an effective veto; there, she is not. Beyond what is demanded by a national constraint that requires procedural due process in their enforcement, traffic laws and their enforcement in New York bear no necessary relation to those of neighboring Vermont. Informal national bodies such as the American Law Institute,

⁵ Stephen Breyer, *The Court and the World – American Law and the New Global Realities* (2015).

⁶ Herwig Hoffman, *Agencies in the European Regulatory Union*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2804230, visited July 16, 2016, eloquently makes this point in the context of EU agency law.

whose counterpart was recently established in Europe, or the National Council of Commissioners on Uniform State Laws, provide a certain impetus to coherence in state law matters across state lines, but state lawmakers, whether legislators or judges, must then adopt the understandings they propose for them to have legal effect. The federal Full Faith and Credit Clause⁷ helps make the states “integral parts of a single nation,”⁸ creating unity in some respects, while allowing the states retained autonomy in others. It requires each state to permit the use of its courts by residents of other states able in other respects to meet its jurisdictional requirements; it requires each to apply accepted choice of law principles in determining which state’s law applies to a matter involving several; and it requires each to enforce in civil actions the judgments that another’s tribunals have competently rendered. But about unity in the context of American federalism, too, I propose to say no more. Sustaining the unity of American national public law under a Constitution written almost 23 decades ago, and not significantly amended since, will be challenge enough for this brief essay.

I. Discretion, or *DISCRETION!* ?

Perhaps the place to start is with a problem that much consumed the earlier conference – the relationship between law and executive discretion. Early in American legal history, Chief Justice Marshall – who gave so much of our constitutional law its initial impetus – seemed ill-disposed to judicial engagement with executive exercises of discretion. In general, if not for the particular matter before him, he wrote, the American Secretary of State was an officer who in significant if not all respects was obliged “to conform precisely to the will of the President. He is the mere organ by whom that will is communicated.”⁹ Questions about the actions of such an officer, Marshall continued, which are “in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹⁰ Yet the federal Administrative Procedure Act, after first seeming to agree that its provisions for judicial review of agency action do not apply “to the extent that ... agency action is committed to agency discretion by law,”¹¹ provides in its provision for scope of review that a court is to “hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law.” And indeed there are suggestions that, constitutionally, the possibility of review is a necessary condition of some agency authority involving a great deal of discretion – such as deciding just how much sulphur dioxide a coal-burning power plant should be permitted to emit. The point was made pithily and well by Harold Leventhal, a court of appeals judge whose opinions remain central to contemporary understandings of rulemaking: “Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegations—*because* there is judicial review to assure that the agency exercises the delegated power within statutory limits, and that it

⁷ Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.” U.S. Const. Art. IV, Sec. 1.

⁸ *Milwaukee Country v. M.E. White Co.*, 296 U.S. 268 (1935).

⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

¹⁰ *Id.* at 170.

¹¹ 5 U.S.C. 701(a)(2).

fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”¹²

That questions of foreign policy (in which the Secretary of State acts as a presidential surrogate) are “political,” beyond judicial reach, is clear enough -- **DISCRETION!** But final governmental action having an impact on an individual’s legal status or obligation under the authority of a federal statute involves, rather, “discretion,” over the exercise of which the judiciary necessarily has some purchase. “In a series of decisions over the past decade and a half, the Supreme Court has pushed back against the absolute power of the executive branch and Congress over detainees. The Court has refused, as Justice Sandra Day O’Connor put it in 2004, to give the political branches a ‘blank check.’”¹³ Indeed, most ordinary domestic final administrative actions are subject to review for “abuse of discretion” even if legal rights, as such, are not affected – so long as one can demonstrate the elements (injury in fact, causality, remediability) that establish standing to sue. Thus, residents of Memphis, Tennessee were successful in blocking the construction of a highway through an urban park they used, their enjoyment of which would be impaired. A statute establishing criteria for the Secretary of Transportation to use in approving such a project sufficed to create “law to apply,” and the Secretary’s actions did not establish that those criteria had been met.¹⁴ Outside the strictly political realm, then, questions arising out of Congress’s commitment of decisions to the executive, the creation of executive discretion, not only can but almost certainly must be available to judicial review.¹⁵

II. How is one to interpret a document written for the ages?

As is perhaps notorious, the difficulties of the Constitution’s formal amendment have left to the Justices of our Supreme Court the work of accommodating its spacious text to changing times, to the industrial age, to the electronic age, and to America’s emergence as a world power; and the Justices have not been of one mind how, or even if, this is to be accomplished. The drafters of the French Code Civile, another spacious text created not so many years after ours, clear-headedly saw this problem and the resulting, necessary judicial role.

To simplify everything, that is an operation on which one needs to agree. To foresee everything, that is a goal impossible of attainment. . . . Is it not strange that those to whom a code always appears too large imperiously give the legislator the terrible task of leaving nothing to the decision of the judge?... A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change, which never stops, and the effects of which are so diversely modified by circumstances, produces at every instant some new combination,

¹² Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (emphasis supplied).

¹³ John Fabian Witt, “The Law of the Land,” The New York Times, Sept. 20, 2015, p. BR 1.

¹⁴ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

¹⁵ The Supreme Court has been coy about explicitly proclaiming a constitutional necessity for judicial review of administrative decisions but (as Judge Leventhal’s quoted remark reveals) nonetheless treats the validity of Congress’s creation of administrative authority as conditioned upon it.

some new fact, some new result. ... The function of the law is to fix, in broad outline, the general maxims of justice, to establish principles rich in suggestiveness, and not to descend into the details of the questions that can arise in each subject.... It is for the judge and for the lawyer, embodied with the general spirit of the laws, to direct their application. ... [T]he science of the judge is to put [legislative] principles in action, to develop them, to extend them, by a wise and reasoned application ... ; to study the spirit of the law when the letter kills, and not to expose himself to the risk of being alternatively slave and rebel, or to disobey because of a servile spirit. ... It is for experience to fill in gradually the gaps we leave. The codes of a people are made with the passage of time; but correctly speaking, one does not make them . . . One reasons too often as though the human race ended and began at each moment [in time], without any communication between one generation and the generation that replaces it. The generations, in succeeding each other, mix, become interwoven, and merge.¹⁶

Early in our constitutional history the great Chief Justice John Marshall, invoking the necessary implications of so spacious a text, reminded that “we must never forget that it is a *Constitution* we are expounding.”¹⁷ “Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”¹⁸ Most Supreme Court Justices, and most Supreme Court opinions, most of the time, have accommodated these realities and perspectives. But some Justices today forcefully espouse “originalism,” the proposition that the particular understandings of the drafters and ratifiers of the Constitution’s language must control decision about its meaning. This strongly appeals to them as a means of constraining judicial decisionmaking about constitutional meaning, decisionmaking that could be overcome only by a constitutional amendment that would be extremely difficult to achieve, or by a future Court’s overruling of a decision already reached.

In a world that has moved from hand-loaded muskets and rifles to semi-automatic weapons capable of massacring dozens, perhaps the most striking recent reflection both of the originalist approach and of departures from it to accommodate the Constitution’s text to what Justices may view as contemporaneously appropriate outcomes lies in the Court’s recent treatment of legislation controlling citizen possession of firearms. Since 1789, the Constitution’s Second Amendment has provided that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In 2008, a bare majority of the Court, insisting on what it found to have been the original understanding of this language, and rejecting a dissenting argument that its reference to “a well regulated Militia” constrained its meaning to what might be necessary to support such a quasi-military force, rejected as unconstitutional gun control legislation from the federal District of Columbia, a

¹⁶ Portalis, Tronchet, Bigot-Premonneau & Maleville, “Discours preliminaire”, in 1 J. Loche, *La Legislation Civile, Commerciale et Criminelle de la France* 251, at 255–72 (1827).

¹⁷ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)(emphasis in original).

¹⁸ *Ibid.*

federal enclave that the Second Amendment's language directly controls.¹⁹ But the amendment's language, in terms, reaches only federal legislation.

Could a state or other city more successfully regulate the possession of weapons unimaginable in 1789? Not in general, a bare majority ruled two years later in *McDonald v. Chicago*.²⁰ The Fourteenth Amendment to the Constitution, adopted following the American Civil War, had provided both that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" and "nor shall any state deprive any person of life, liberty, or property, without due process of law." The first case to consider the meaning of this amendment regrettably denied what appears to have been the case, that "the privileges or immunities of citizens of the United States" refers to the protections afforded Americans by the federal Bill of Rights.²¹ Over the years following, while adhering to this constrained reading, the Court began to rely on the "due process" language to limit state authority in respect of some of these liberties. At first it did so in relation to judicially invented formulations, such as state conduct that would "shock the conscience."²² Subsequently, reacting against the judicial subjectivity inherent in such formulations, the Court began to find that some, but not all, of these rights had been selectively "incorporated" as against states by the "due process" language, in precisely the way in which they applied to the federal government.²³ Here, however, one could hardly claim that this was the original understanding of "due process," in either the Fourteenth Amendment or the Fifth Amendment whose language it repeats; and, indeed, the Court's earlier invocations of substantive "due process" concerns to invalidate state economic legislation had produced fierce controversies that almost resulted in the Court's transformation, before it providentially turned away from this approach.²⁴ Four Justices, relying on this line of prior judicial opinions, now reasoned that the Second Amendment's protections had the importance warranting "incorporation." Justice Clarence Thomas, the most consistently originalist of the Justices, would have overruled the early "privileges and immunities" decision to reach the same result. For the dissenters, the Second Amendment failed to satisfy the criteria the Court had created in deciding prior "incorporation" disputes. Readers interested to experience the debate between originalist and living Constitution advocates, as compounded by the practice of *stare decisis*, could learn much from the *McDonald* concurrences of Justices Thomas (originalist) and Scalia (originalist modified by adherence to accepted prior Supreme Court opinions²⁵) and the dissent of Justice Stevens (living Constitution, to be interpreted in response to the needs of the current day).

¹⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁰ *McDonald v. Chicago*, 561 U.S. 742 (2010). A general right of ownership of weapons that *might* be appropriately used for lawful purposes, and not whether particular classes of persons, such as persons convicted of crime, the mentally ill, or suspected terrorists, could be denied them was at issue.

²¹ *The Slaughter-House Cases*, 83 U.S. 36 (1873).

²² *Rochin v. California*, 342 U.S. 165, 176 (1952).

²³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁴ Its revival in the context of personal liberties – abortion, homosexual conduct, same-sex marriage – underlies much of the resistance to those opinions.

²⁵ Justice Scalia, for example, refused to accept the abortion opinions, while other Justices who would not have accepted them as an original matter have accepted them. And his willingness to depart from what he determined to be original meaning was limited to precedents established by the Supreme Court; that eleven circuits and the

III. Accommodating the Constitution's Requirement of "Due Process" to Contemporary Needs for Procedure

Insofar as procedures are concerned, the American Bill of Rights requires a number of specific safeguards in the context of criminal prosecutions – though, again, it does so in general terms that have required judicial elaboration – but for civil matters it says only that no person may be “deprived of life, liberty or property without due process of law.” This formula is central –and while it is the only phrase repeated twice in the Constitution (once as against the federal government, and then again as against the states) it is also highly uncommunicative. Because the words are in the Constitution, the courts have insisted that they, not legislatures, must have the final say just what processes are requisite.

Early in the 20th Century, the Supreme Court faced the question whether this constraint reached legislative processes, or only particularized individual decision-making, such as would occur in court but also in some administrative agency settings. It decided that “due process” reaches only particularized individual decision-making.²⁶ This judgment has endured despite a remarkable growth in the use of secondary legislation, agency-created regulations that Americans describe as quasi-legislative actions which, if valid, have precisely the same force and effect as statutes. In 1946, prior to this explosion in the use of rulemaking, the established a set of statutory procedures for the process, and one can speculate that the failure to apply “due process” reasoning to rulemaking is substantially owing to these *statutory* procedures for their adoption. Indeed, the stated requirements of these procedures are quite minimal, and in interpreting them the courts have shown considerable responsiveness to the emergence of rulemaking as a major source of legal obligation. And, because each agency’s rulemaking must be authorized by a statute affording “intelligible principles” by which judges can assess the legality of its exercise, courts are afforded a measure of substantive control considerably greater than the Constitution gives them in relation to the validity of statutes.

As a source of procedural obligation, “due process” began as a constraint on judicial procedures; early decisions in the administrative context suggested a tolerance for considerable informality, “some kind of a hearing,”²⁷ limited to conventional liberty and property interests. Judicial reaction to the excesses of the McCarthy era in the initial years of the Cold War generated increasing specificity in its application to administrative actions. In the 1970’s, recognition of citizens’ expanding dependence on relations with the state led the courts to find what was described as a “new property” in legally fixed relationships with the state – a driver’s license, say; or a tenured position at a state college; or even a student’s legally assured public education. But then, what procedures must be according the citizen whose rights are interfered with? Must they be the same for a student’s brief suspension from school as for dismissal from a tenured state job? The Supreme Court seemed initially to move in the direction of listing

responsible federal agency had long agreed on one reading of a 1934 statute did not prevent him and fellow originalists from ascribing to it a different meaning that they determined would have been the one expected in 1934. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

²⁶ *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915).

²⁷ *Londoner v. Denver*, 210 U.S. 373 (1908).

invariably required elements, but this quickly proved unworkable.²⁸ The question arises in highly variable contexts, and that approach also threatened to constitutionalize many matters that the states dealt with in ordinary law.

In *Mathews v. Eldridge*,²⁹ a case involving the termination of payments under a governmental disability support scheme, the Supreme Court came to rest on a formula for structuring litigation over the due process issue, a formula that has been stable now for forty years. The court is to consider, for the general case and not the particular facts before it, the importance to the government and to the private parties of the matter in dispute, the risks of error inherent in the procedures currently provided, and whether those risks can reasonably be reduced by substitute procedures that are proposed. As may be apparent, application of this formula is hardly a trivial matter, nor are outcomes mathematically assured. Consider, as one setting now in litigation, how one might offset the government's national security interests in preventing persons it believes might be terrorists from boarding airplanes in or heading for American airspace, as against a citizen's protected liberty of travel. The one-sided anonymity of the procedures the government established both created a relatively high risk of error and reflected a need not to reveal information that might, in itself, raise the risk of successful terrorism. Persuaded that more must be accorded, courts have struggled to find an appropriate balance in the face of national security interests they dare not prejudice. Significant movement toward regularity nonetheless appears to be occurring. From one perspective, the formula produces highly variable, situation-dependent results; yet one can also say that it contributes to the unity of public law as a cohesive and comprehensible framework for giving the Constitution's ancient and unchanging words contemporary meaning.

IV. The Hole in the American Constitution

As has often been noticed, there is a remarkable hole in the American Constitution, which does not define the federal government or its permitted powers, and which is strikingly silent about important elements of the President's relation to that government. Both silences still generate considerable controversy touching the "unity" theme, and further illustrating the difficulties of accommodating an 18th Century document to current realities.

The Constitution creates the offices of President, Vice President, and Supreme Court (albeit such issues as number of Supreme Court Justices and the extent of its appellate jurisdiction are also left to statutory definition) but leaves the formation of American government entirely to Congress. An initial draft would have specified several governmental departments and their general responsibilities; it was replaced by Article I, Sec. 8, cl. 18, that empowers Congress

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.³⁰

²⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁹ 424 U.S. 319 (1976).

³⁰ Art. I Sec. 8. As an unintended residue of the earlier version, this clause refers to "powers vested by *this Constitution* in the government of the United States, or in any department or officer thereof" (emphasis added), but

Even in the beginning, the small Cabinet Congress created had highly varying characteristics. Departments of State and War were strongly tied to the presidency. We have already seen how Chief Justice Marshall, in the opinion for which he is perhaps best known, described their leadership as serving as the President's alter ego in their discretionary functions. Their actions, he reasoned, raised only political questions and could never be questioned in court. But with virtually the same breath as created these departments, Congress created a Department of Treasury with officers essentially answerable to it, and functions that could not be described, either in reality or as a necessary element of their nature, as exercises of *presidential* discretion. The same Congress chartered a National bank, with mixed governmental and private characteristics, and within a few decades it would create a Steamboat Inspection Service only loosely connected to the Treasury Department and possessing broad regulatory powers over the steamboats whose exploding boilers had become a frequent cause of disaster.³¹

In the more than two centuries of the government's existence, Congress has created a profusion of governmental and quasi-governmental bodies, structured in a variety of ways, enjoying different powers and, if their statutes so provide, following different procedures in their interactions with the public. It recognized the general need for procedural cohesion when it enacted an Administrative Procedure Act [APA] in 1946, after an extraordinary empirical inquiry had revealed striking variations in practice – disunity in public law – among the rapidly expanding body of federal administrative agencies. The APA's terms, like the Constitution's, have been little changed since its enactment. Yet when Congress has considered particular programs, it has often varied these procedures, and not invariably to secure more effective governmental action. “Due process” may then provide the only “unifying” judicial defense.

Variation has been particularly striking with the creation of bodies mixing public and private characteristics. From the creation of the first National Bank of the United States soon after the Constitution was ratified forward, Congress has legislated mixed bodies, private in some respects and public in others. Recent litigation involving the National Passenger Railroad Corporation (AMTRAK)³² raised interesting questions about Congress's freedom of institutional design, perhaps surprisingly unresolved after decades of practice in this regard.

AMTRAK is chartered as a corporation responsible for maintaining passenger rail service on the rails of freight railroads, with statutory priority for their use in order to maintain scheduled service on the routes it serves (a small fraction of those that might theoretically be possible). Ostensibly profit-maximizing, it has been dependent on substantial congressional subsidization since its establishment. Eight members of its nine-member board of directors are nominated to that position by the President, with the advice and consent of the Senate; but the

this solipsism is universally ignored, and the clause as a whole is understood to empower Congress to create governmental bodies and define their powers.

³¹ Robert Gudmestad, *The Horrific Accident That Created the Regulatory State*, BloombergView, January 31, 2013, available at <http://www.bloomberg.com/view/articles/2013-01-31/the-horrific-accident-that-created-the-regulatory-state>; Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2014).

³² *Department of Transportation v. Assoc. of American Railroads*, 135 S. Ct. 1225 (2015).

ninth member, its chief executive officer, is selected by the Board. In addition to the normal activities of managing complex railroad operations, AMTRAK is authorized, together with an undoubted federal agency that is part of the Department of Transportation, to set certain standards for on-time service that can impact freight service on the rails it uses; and if this proves problematic, provision is made for binding arbitration under the aegis of yet another government agency. Treating AMTRAK as a private company, a court of appeals panel had found these arrangements invalid, as improperly delegating authority to a private body to create binding legal obligations. The Supreme Court found this reasoning invalid because, it concluded, the totality of AMTRAK's circumstances made it a public body, and hence one that could be so empowered. But that left open questions that the lower court had not decided:

- Wouldn't AMTRAK's CEO, a full voting member of its nine-person board, also require appointment by the President with the advice and consent of the Senate? Mixed bodies of this character are not uncommon. The United States Postal Service is similarly constructed. The Federal Open Market Committee, astride the nation's money supply, has long been a striking example, mixing presidential appointees from the Federal Reserve with designees from particular Federal Reserve banks who come from private life. Can these arrangements be fit into the Constitution's explicit provisions respecting federal office, including the need to take an oath to support the Constitution, and to receive a presidential commission to office?
- Does the provision for binding arbitration require use of a government employee, given the effect of an arbitral judgment? Must it be subject, and in what respects, to judicial review? Given the nature of the arbitrator's powers and responsibilities, can her appointment properly be made by the administrator of a relatively minor agency, a subordinate part of a government department, or mustn't it be made by the departmental secretary if not the President himself? Again, this statute is hardly the only one to provide for the possibility of arbitration without addressing these issues; what may be striking is that they are unresolved.

V. Accommodating "Separation of Powers" to the Regulatory State

Although the Constitution does not define the government, it appears to envision a government in which each of its three created branches would exercise a unitary governmental function. The Congress would legislate; the President would execute the laws – that is, implement and enforce them; and the judiciary would be responsible for all adjudication. "Separation of powers" was an important political concept at the time, imagined as a means of preventing tyrannical government and, in particular, the absolute monarchies still prevailing in Europe. The first words of the Constitution, "we the people," signal the idea that the government's authorities depended on a popular grant of the authority to govern, and in this context John Locke's observation about a legislature's authority, well-known to the drafters, seems especially forceful:

The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting

the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.³³

Yet in the government that Congress has created for a regulatory state unimaginable to the Constitution's framers, administrators are empowered to adopt regulations that, if valid, have precisely the same effect as statutes, and initially to resolve disputes with (and occasionally between) individuals that could readily be assigned to the judiciary, as well as to implement and enforce the laws Congress has made.

Other legal systems may resolve such difficulties by requiring the high volume of secondary legislation the industrial and information ages have made inevitable to be laid before the legislative body for its approval, so that it becomes valid as a legislative act; and by causing administrative disputes to be decided by an element of the judiciary. Neither of these routes is taken in the United States. Congress can of course *disapprove* regulations agencies adopt, and prevent them from becoming effective for a time that would permit it to consider that step,³⁴ but to do so requires a statute, and unless the presidential administration has changed in the interim, that may invite a veto. The American disjunction between executive and legislative branches effectively makes the creation of regulations an executive, not a legislative activity. And the single American judiciary does not have an administrative dispute component; the initial resolution of administrative disputes, also, occurs within executive authorities. While initially the Supreme Court indicated that such commitments could be accepted only if judicial involvement was not constitutionally required, or if the administrative body could be found a judicial adjunct, this approach no longer obtains. For most purposes (criminal trials being an obvious exception), the availability of judicial review – the fact of *some* connection to the constitutional judiciary – suffices.³⁵

The fact of some connection to the constitutional judiciary suffices, as well, for the agency activity of rulemaking. We have already seen this point was made pithily and well by Harold Leventhal, a court of appeals judge whose opinions remain central to contemporary understandings of rulemaking: “Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegations—*because* there is judicial review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”³⁶ Delegations – more properly characterized as authorizations of executive rulemaking, since it is

³³ John Locke, *Second Treatise of Civil Government*, Ch. 11, Sec. 141 (1690).

³⁴ The Congressional Review Act, 5 U.S.C §801. The Act, if complied with, does serve to keep Congress aware of agency rulemakings; but it has been successfully invoked only once, by the succeeding Congress, with the approval of President Bush, in respect of a rule adopted late in the Clinton administration

³⁵ *CFTC v. Schor*, . 478 U.S. 833 (1986).

³⁶ *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (emphasis supplied).

not legislative power that is being exercised – are valid only if there is an “intelligible standard” in the authorizing statute, by which the legality of a rulemaking can be assessed.

“Intelligible standard” may not seem a particularly demanding standard; the Supreme Court has expressed doubt whether there are judicially manageable standards for determining whether Congress has legislated with insufficient precision.³⁷ But in at least two respects it contributes to the possibility of containing government action within the rule of law: first, it informs government attorneys at every stage of their need to relate their agency’s actions to the demands of legality; they must be prepared to demonstrate such a standard, and a challenged action’s relation to it in every case; and, second, it permits judges, in construing particular grants of statutory authority, to choose those constructions that avoid surprisingly expansive readings – to avoid, as Justice Scalia once put it, finding an elephant in a mousehole.³⁸ That the judicial review of the merits of important regulations is highly intense when it is sought serves as an additional constraint.

The accommodation to separation of powers, then, is to understand that agencies are uniquely tied to neither the President, the Congress nor the courts – the only bodies the Constitution seriously addresses – but rather are in necessary and subordinate relationships with all three. The hole in the Constitution, the American federal government, is filled by Congress. No agency may act without statutory authorization; and Congress is in charge, also of the financial resources it has for its actions,³⁹ and is able to call administrators before it to examine their actions. Every executive agency, even those styled “independent regulatory commissions,” is necessarily subject to presidential oversight.⁴⁰ And for final actions directly affecting private persons, both rules and administrative adjudications, judicial review is also available, for both legality and reasonableness of judgment.

VI. Constructing the Presidential Role in Administration

Perhaps an important starting point for persons familiar with parliamentary government is to realize that while the American President may and sometimes does consult with his Cabinet (that is, the thirteen Secretaries of federal departments named as such), they do not constitute a government in the council of ministers sense. The drafters of the American Constitution unmistakably chose a unitary executive over a governing council, as a means of focusing political responsibility for the actions of what, at the time, was anticipated to be quite a small governmental establishment. Thus, the President is not obliged to consult with the collective of the heads of the Departments the Constitution anticipated Congress would create (known as his Cabinet, a word and an idea that does not appear in its text), and the Cabinet lacks any kind of governmental authority or responsibility as a unit. Nor, indeed, do its elements constitute the whole of executive government, even putting aside America’s contribution of independent regulatory bodies to the institutional lexicon. The Civil Intelligence Agency and the

³⁷ *Mistretta v. United States*, 488 U.S. 361 (1989).

³⁸ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); frequently mentioned examples of this approach are *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S.218 (1994)(“modify”) and *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000)(“drug,” “device”).

³⁹ It may provide for certain elements of self-financing, as by the charging of fees for its services; and the possible difficulties this creates in relation to rule-of-law controls have been noticed. Michael Greve and Christopher DeMuth, Sr., *Agency Finance in the Age of Executive Government*, available at SSRN: <http://ssrn.com/abstract=2798289>.

⁴⁰ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 477 (2010).

Environmental Protection Agency are large governmental bodies structured just as Departments are, but they are not so designated, nonetheless; and the President's more regular consultations are with smaller bodies such as the National Security Council, the Council of Economic Advisors, and the Office of Management and Budget, that sit within the separate collection of bodies known as the Executive Office of the President, and that lack the kinds of regulatory authority over private activity that Congress has created for bodies such as the Department of Agriculture and the EPA.

But does the presidency's unitary character mean that the President, as the unmistakable hierarchical head of the executive, has the authority to take any decision Congress might assign to one of the agencies it creates? The Constitution's text places the executive power, all of it, in the President, and obliges him to take care that the laws are faithfully enforced. On the other hand, its text no longer contains a phrase to be found in an early draft, that would explicitly have authorized him to decide all matters committed to the executive. And although it makes him, in terms, "Commander in Chief" of the nation's military – in a position, that is, to give legally binding orders to subordinates – all that it says about his relations to the heads of departments, generally, is that he is to nominate them (with the advice and consent of the Senate) and may then "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." In the middle of the 19th Century, an Attorney General had reasoned from the fact of a unitary constitutional executive with an obligation to see to the proper enforcement of all law, to the conclusion that the President necessarily possessed decisional authority; conservative legal scholars and, increasingly, Presidents and their immediate staff have taken this position.⁴¹ But one of this Attorney General's predecessors had just as confidently seen in the congressional assignments of legal duties *to others*, foreseen in the Opinions in Writing clause, an element of the laws for whose faithful execution (that is, respecting that assignment) the President was obliged to "take care."⁴² More liberal legal scholars, prominently including the author, see in this reasoning (and the contrast between "Commander in Chief" and "require opinions, in writing") an indication that the proper presidential role is one of oversight, not decision.

The most relevant judicial precedent, at the circuit court level,⁴³ and elements of the impeachment process against President Nixon, indicate that for enforcement matters assigned to others, in particular, the President may not play a decisional role; but in respect of rulemaking, the issue remains open and the unabated trend, in an era when some regulations have the capacity significantly to affect the nation's economy, is toward presidential decisional control.

⁴¹ "[N]o Head of Department can lawfully perform an *official* act against the will of the President, [because a contrary view would permit Congress so to] divide and transfer the executive power as utterly to subvert the Government, [albeit that] all the ordinary business of administration [is, in statutory terms, placed under the authority of the Departments, not the President, and] may be performed by its Head, without the special direction or appearance of the President." (emphasis in original). Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469-71 (A.G. Cushing, 1855)

⁴² Attorney General William Wirt remarked in an opinion preserved in the first volume of Opinions of the Attorney General, "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself." 1 Op.

A.G. 624, 625 (1823)

⁴³ Portland Audubon Soc. v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993).

What has not been disputed, and again tends to unify one's understanding of American public law, is that the Constitution requires Congress to refrain from empowering itself in relation to executive matters and requires it, as well, to accommodate the possibility of substantial presidential oversight. Here, again, as with "intelligible principle," the law is soft at the edges. In requiring Senate confirmation of the heads of departments and other major officers, Constitution invites the possibility of difference between the President and each officer; the confirmation process can block his strongest political allies, and extract promises of behavior the candidate may feel politics and personal integrity constrain her to honor. The power to remove a department head from office is unmentioned in the Constitution. It is clear that the Senate cannot demand its own assent to a removal,⁴⁴ but the Supreme Court readily sustained the creation of a civil service of permanent governmental employees – including, at one time, bureau chiefs having significant decisional authority – with tenure that could be interrupted only by decision of an independent commission.⁴⁵ Subsequently it decided that Congress could protect the commissioners of "independent regulatory commissions" – effectively the heads of a department, necessarily appointed by the President with Senate confirmation – from dismissal except "for cause."⁴⁶

The power to remove an officer from office is somewhat less than the power to substitute one's own judgment for her particular opinions. Even when unhindered legally, its use may be constrained by the political costs to be paid – both directly, in public opinion, and indirectly, in the need to persuade the Senate to confirm a nominated replacement and in the impaired administration of the agency concerned until this can be effected. Certainly, there are some officers – the Secretary of State, say – for whom one could confidently expect that any attempted *legal* constraint on the President's removal authority would be rejected as an infringement of his necessary relations with some department heads; this would be an officer who in significant if not all respects is obliged, as Chief Justice John Marshall early put it, "to conform precisely to the will of the President. He is the mere organ by whom that will is communicated."⁴⁷ But what of officers, like the heads of most government agencies, who have independent duties, are not obliged by law "to conform precisely to the will of the President," and take decisions that are permissible *only because* judicial review of their legality and reasonable basis has been provided for?⁴⁸

If, as has long seemed to the author,⁴⁹ the independent commissions are inescapably "executive" and thus within the ambit of the President's executive power, and yet may be protected from removal except "for cause," why is the same reasoning not applicable to the head of the Environmental Protection Agency. The EPA is headed by a single administrator not a collegial body, to be sure, yet its administrator is possessed of distinctive legal duties Congress has created, and created honoring what seems the necessary condition that their exercise must be subject to judicial review.

⁴⁴ Myers v. United States, 272 U.S. 52 (1926).

⁴⁵ United States v. Perkins, 116 U.S. 483 (1886).

⁴⁶ Humphrey's Executor (Rathbun) v. United States, 295 U.S. 602 (1935).

⁴⁷ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

⁴⁸ N. [21 – Ethyl Corp.] above.

⁴⁹ Peter Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum.L.Rev. 573 (1984).

The Supreme Court's recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁵⁰ is significant both for its confirmation that the Securities and Exchange Commission, one of the several "independent regulatory commissions," must be regarded as an element of the executive branch and thus necessarily subject to presidential oversight; and for its conclusion that in placing one independent regulatory body, the Public Company Accounting Oversight Board, within another, the SEC, Congress had created an institution too far removed from that oversight. Congress created the PCAOB following a major corporate accounting scandal. Its five members, appointed to fixed-term positions by the SEC, and removable by it only for carefully defined "cause," would not be government employees. Their pay is set far in excess of even the most senior government executives, including the President, as a means of attracting high-level professionals; civil service rules do not govern its staff, nor the Administrative Procedure Act its procedures. Yet Congress tied it so closely to the Securities and Exchange Commission as to lead the Court to conclude that the possibility of effective presidential oversight was a constitutional necessity. The Court reasoned that the President or some subordinate subject to his direct control must have removal authority; when Congress placed the authority to remove as well as to appoint members of the PCAOB in the Commission, and not in him, and limited that removal authority to a showing of "cause," it defeated the necessary level of presidential oversight. The President had adequate oversight of SEC actions, the Court concluded, so long as the Commission was itself free to control the tenure of its bureau chiefs and other decisional employees, under the President's watchful eyes. But limiting the SEC to "for cause" removal of the Board's members doubled the oversight barrier. Congress could not be permitted to place executive functions so far out of the President's grasp.

VII. Securing Uniform National Agency Administration

One perhaps obvious element in securing a unified public law is that national administration of the law should be uniform, and the Constitution's provision for a Supreme Court able to address all questions of federal law that are properly put to it clearly embodies that expectation. Yet the Supreme Court has not significantly changed in its capacity to carry a docket since the founding, while the caseload of the national courts (and state courts deciding issues of federal law) has exploded. Today, the federal Circuit Courts of Appeal publish opinions in well over 10,000 cases annually⁵¹; the Supreme Court in recent years has been carrying a docket of about 80 cases annually; its maximum has been about twice that. And the Circuit Courts are geographically organized, each with authority to decide matters arising in a limited number of states. The decision of one Circuit may be persuasive to another, but has no authority to govern that other Circuit should the same question arise there.

The Supreme Court chooses its docket from among cases offered to it by petitions for review (styled petitions for writs of certiorari), and it should not be surprising to learn that the existence of a split among the circuits – disuniformity in the understanding of federal law – is one of the most important reasons for granting the writ. Still, there would be utility in measures tending to reduce the likelihood of a split, and perhaps especially so for a government agency, for which the obligation to implement one understanding of its governing law in New York, and another in Ohio would contradict its own obligations of uniformity in the administration of the statute(s) for

⁵⁰ 561 U. S. 477 (2010).

⁵¹ The number of cases they decide without published opinions is considerably larger.

which it is responsible. One might add that agencies are often better placed to understand their constitutive statutes than reviewing courts. They have often participated in their drafting; they implement them under the watchful eye of the Congress that enacted them on its own understanding of what was being accomplished; and they live with them day-to-day, in their entirety and in their relation to the whole conger of laws establishing their responsibilities. Court encounters with their statutes are infrequent, happenstantial, perhaps the result of marginal issues and party litigating choices that do not reflect the generality of matters that might be affected by the questions in dispute; and the possibilities of bringing a reviewing court into full understanding of context are limited.

There can be coherence-promoting virtues, then, in approaches to judicial interpretation that promote, to some extent, acceptance of agency views. One, that can be found in the cases as early as the first part of the 19th Century, exhorts courts to give weight to those views when reaching their own judgments about statutory meaning. Another, first clearly framed in 1944⁵² and given a general formulation 40 years later in the famous *Chevron* case,⁵³ takes the further step of treating statutory uncertainties as delegating to the agency concerned the initial authority to resolve the uncertain questions of meaning. Here, the courts' independent role is limited to deciding what are the reasonably possible conclusions about statutory meaning; once it has thus framed the authority conferred on the agency its question is not deciding for itself what, precisely, the statute means, but rather assessing the reasonableness of the agency's judgment. It may be apparent that multiple courts' independent judgment about how much space an agency's statute gives it for judgment are less likely to disturb the uniform national administration of that statute than multiple courts' independent judgments about precise statutory meaning – even if those judgments accord appropriate weight to the agency's views. For the author, this has long seemed an important way of understanding *Chevron*, as a case that both promotes coherent national law and tends to reduce the Court's "circuit conflict" docket.⁵⁴

Much of the confusion and controversy about *Chevron*, which to him seems a rather straightforward, readily understood decision, is tied up with concerns about judicial "deference" to administrative action, when all understand that it is the judiciary that must finally be responsible for resolving questions of law, if the rule of law is to be preserved. "Deference" is an inexact term, used both to signal the appropriateness of judicial attention to agency views when the court is deciding a question of law, for the reasons given in the next previous paragraph above; and, in its *Chevron* appearance, to describe the transformation of judicial role that occurs when judges determine, *for themselves*, that Congress has delegated primary responsibility for actions within a statutory gap to a government agency. The question of law here, which *is* a question for judicial resolution, is how much authority the Congress has validly conferred on the

⁵² National Labor Relations Board v. Hearst Corp., 322 U.S. 111 (1944).

⁵³ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁵⁴ Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum.L.Rev. 1093 (1987).

agency. Once a court has independently confirmed that authority, its function naturally shifts from independent decision to oversight of another's.⁵⁵

VIII. Conclusion

Beginning with “discretion” and ending with “deference,” this paper again reflects themes that proved important to that first “The Unity of Public Law” conference. Both terms are inexact, neither is in our written Constitution, and their use tends to confuse rather than illuminate thought. Some elements of executive **DISCRETION!**, outside the judiciary’s possibility of oversight or control, are inevitable and, save as recognition of that zone is itself an element of public law’s unity, within it coherence cannot be expected or enforced. The question then is the relative breadth of the zones of **DISCRETION!**, and that “discretion” that judges do regularly assess in attending to the rule of law, the coherence and regularity of government behavior towards the private world. After what might have seemed an unpromising start in *Marbury v. Madison*, both Congress and the American judiciary have understood government’s direct impact on private interests, well beyond conventional legal rights of person or property, as the signal that “discretion,” not **DISCRETION!**, is involved. In one of its uses, “deference” is simply a signal to judges that in independently deciding questions of law, agency knowledge, responsibility and behavior warrants their giving it weight. Its other, more controversial, use signals not abandonment of judicial responsibility, but the conversion of that responsibility from independent judgment to oversight of the legality and reasonableness of a decision legislatively committed to another. If one understands that it is acceptable for the legislature to assign primary responsibility for resolution of certain issues to an executive body, given its focused responsibilities and consequent understandings, then this kind of “deference” is merely an acceptance of what naturally follows from the court’s independent conclusion that this is what has been done. The court remains in independent charge of who *must* be considered an “employee,” and what relationships *cannot* be so characterized, but to the extent “employee” is a term of variable content, the legislature’s assignment of decision within that gap to an agency responsible for labor policy, under judicial supervision, raises no threat to the unity of public law.

America’s written Constitution is, in and of itself, a commitment to the unity of American public law, albeit an incomplete one. Its gaps and imprecisions, and questions about its interpretation, have left in judicial hands the responsibility for a kind of common law constitutionalism that, over the centuries, has proved both variable and highly controversial. One need only attend the debates in our current presidential election to understand how contingent is the direction of that unified understanding – as probably, for that matter, the place of foreign and international law in it, and our balance between **DISCRETION!** and “discretion,” “deference” and “deference.”

⁵⁵ Peter Strauss, “Deference” is too Confusing – Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 Colum. L. Rev. 1143 (2012).