NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

THE ANTI-FEDERALISTS: PAST AS PROLOGUE

Hon. Andrew S. Oldham*

ABSTRACT: The Anti-Federalists should be required reading for anyone who wants to understand our Constitution. That's for three reasons. First, we owe them credit for the Bill of Rights. Second, their papers are rich in predictive judgments and political theory that should be studied, evaluated, and understood in and of themselves. Third, the Anti-Federalists framed the constitutional debate in 1787—and in some ways, they continue to frame it today. Their themes reverberate across the centuries. And nowhere do they reverberate more loudly than in our debates over executive power and administrative law.

INTRODUCTION

Depending on your perspective, these are either exciting or perilous times for administrative law. The Supreme Court is

* Circuit Judge, United States Court of Appeals for the Fifth Circuit.

reconsidering longstanding deference cases like *Auer* and *Seminole Rock*.[1] Some suggest *Chevron* should be next up.[2] Scholars like Philip Hamburger are challenging assumptions that were quasi-sacred when I was in law school.[3] And as this Symposium has explored, administrative agencies are facing challenges that hardly could have been imagined 20 years ago—much less 230 years ago.

Or could they? One thing that never ceases to amaze me is how few of our debates are really new.[4] Nearly all of them have their roots in centuries past. So as we consider the *modern* debate about the scope

---

[1] See *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (granting certiorari on the question whether *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled). The Court decided not to overrule either precedent. But it is unclear whether the doctrine should be renamed "*Kisor* deference." See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448–49 (2019) (Kavanaugh concurring in the judgment) ("Formally rejecting *Auer* would have been a more direct approach, but rigorously applying [the new *Kisor* approach] should lead in most cases to the same general destination.").

[2] See, e.g., *Kisor*, 139 S. Ct. at 2425 (Roberts concurring in the judgment) (noting *Kisor* does not "touch upon" the "[i]ssues surrounding" "judicial deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); id. at 2449 (Kavanaugh concurring in the judgment) (same); *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."); *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1211 (2015) (Scalia concurring in the judgment) ("Heedless of the original design of the [Administrative Procedure Act], we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court . . . interpret . . . statutory provisions," we have . . . held that *agencies* may authoritatively resolve ambiguities in statutes."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151–58 (10th Cir. 2016) (Gorsuch concurring); Mike Lee, U.S. Senator, *Remarks on Separation of Powers Restoration Act: Ending* Chevron *Deference* (Mar. 17, 2016), (transcript available at https://bit.ly/2OiBoS2); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010).

[3] See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 912 (2017); Phillip Hamburger, *Is Administrative Law Unlawful?*, (Chicago 2014).

[4] See *Ecclesiastes* 1:9 ("What has been is what will be, and what has been done is what will be done, and there is nothing new under the sun.").

of executive power, I want to encourage us to remember *the Founders'* debate about executive power.[5]

But when I say "the Founders," I might have a more capacious view of that term than others have. I do not mean just the 55 men who met in Philadelphia in the steamy summer of 1787. Nor do I mean the 39 men who signed the document at the end of the Convention. I certainly do not mean just James Madison, Alexander Hamilton, and John Jay.[6]

Rather, I use "the Founders" to refer to *all* of them. And in my view, that includes those who opposed ratification of the Constitution. Today we call those opponents "the Anti-Federalists"—a label that appears ill-fitting because they wanted *more* federalism, not less.[7]

---

[5] "The executive power" vested by Article II, § 1 in the President is the constitutional source of administrative law. See, e.g., Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L. J. 2580 (2006). One purpose of this speech is to explain the Anti-Federalists' concerns with the breadth of that "executive power" and to ask whether those concerns have enduring relevance to modern debates over administrative law.

[6] Most would agree John Jay should be included in a list of "Founders." But Jay did not attend the Constitutional Convention in 1787. See George Pellew, *American Statesmen: John Jay* 224 (Houghton Mifflin 1898). His role in framing the document, therefore, started when he authored parts of *The Federalist* in response to arguments raised by the Anti-Federalists. He later served (alongside Hamilton) as a deputy to the New York state ratifying convention and as the first Chief Justice of the United States. See id. at 236, 228–29.

[7] See, e.g., Herbert Storing, *What the Anti-Federalists Were For*, in Herbert Storing, ed., 1 *The Complete Anti-Federalist* 9 (Chicago 1981) (noting the irony of the label); see also id. at 15–23 (noting the Anti-Federalists argued government power should rest primarily with States). Other scholars disagree that the "Anti-Federalist" label was "the result of political deceit launched by supporters of the new Constitution" as a way to "'appropriate[]' the popular word 'federal'" and "le[ave] the Constitution's opponents with the negative designation, 'Antifederalists.'" W.B. Allen and Gordon Lloyd, *Interpretive Essay*, in W.B. Allen and Gordon Lloyd, eds., *The Essential Antifederalist* vii, viii (Rowman Littlefield 2d ed. 2002). Allen and Lloyd instead argue the label was apt because the Anti-Federalists feared centralization of government power in a new federal government—hence making them "anti-federal" in that sense. See id. at x–xi.

Nomenclature aside, it's easy to ignore the Anti-Federalists when we have constitutional debates—for example, over the meaning of "the executive power" vested by Article II. The arguments for ignoring them are basically twofold.

First and most obviously: They lost. As their name suggests, the Anti-Federalists opposed the ratification of our Nation's most sacred political text. Obviously, all of us love the Constitution. I pledged my life—with my hand on my grandfather's Bible—to uphold and defend it. So it makes us squeamish to talk about the people who so ardently opposed it and who so badly lost the battle over its ratification.

It's also easy to ignore the Anti-Federalists because history is written by the victors. And no one debates that Hamilton, Madison, and Jay were the victors—even before one of them shot to Broadway fame.[8] One of the spoils of their victory was to write their opponents out of the history books. The Anti-Federalists' names have been largely forgotten to history.[9] Their papers have been out of print for 40 years. They are not read in law school (at least not in mine). And they are almost never cited in court opinions.[10]

Given how badly they lost, why bother with the Anti-Federalists today? Well, one reason is that they didn't lose *everything*. For example, their central complaint about the proposed Constitution was it lacked a bill of rights. And they won that fight. As numerous scholars have recognized, we owe our first 10 constitutional

---

[8] See Jeremy McCarter and Lin-Manuel Miranda, *Hamilton: The Revolution* (Grand Central 2016).

[9] See, e.g., Saul Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 Nw. U. L. Rev. 39, 39 (1989) ("For much of the 200 years following ratification of the Constitution, the Anti-Federalists have suffered the fate usually accorded losers of history's great struggles: later generations have either ignored or excoriated them.").

[10] But see *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1494–96 (2019); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 812 & n. 23 (1995).

amendments to the Anti-Federalists.[11] And given that the Anti-Federalists prevailed in that important battle, we cannot simply ignore them as history's losers.

The second reason often given to ignore the Anti-Federalists is that we should ignore the Federalists too. For example, the Dean of Harvard Law School has argued the Federalists' papers are anonymous propaganda and should be ignored as such.[12] Under this theory, reading *The Federalist* is akin to a judge deciding a case by reading only one party's brief.[13] Just as that has limited usefulness for understanding a disputed legal issue, so the argument goes, *The Federalist* has limited usefulness for understanding the Constitution. That argument is particularly powerful to many today, when few think the Constitution should be understood as embodying the "original intent" of the specific men—like Madison and Hamilton—who wrote it.[14]

---

[11] See Storing, *What the Anti-Federalists Were For* at 65 (cited in note 7) ("While the Federalists gave us the Constitution, . . . the legacy of the Anti-Federalists was the Bill of Rights.").

[12] See John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 Geo. Wash. L. Rev. 1337, 1354 (1998) ("As a piece of advocacy—and an anonymous one at that—The Federalist lacks similar usefulness as a window into the reasonable ratifier's likely understanding."); see also id. at 1339 ("*The Federalist* is nonetheless a piece of political advocacy, whose contents may at times reflect the exigencies of debate, rather than a dispassionate account of constitutional meaning."); Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Georgetown L. J. 1113, 1158 (2003) ("It is arguable that *The Federalist*—written by James Madison, Alexander Hamilton, and John Jay—is less objective than inferences of meaning from the shared linguistic understandings of fifty-five members of the Founding generation at the Philadelphia Convention. More importantly, *The Federalist* is a piece of political advocacy that may not necessarily reflect the original public meaning of the Constitution."). Madison himself worried that *The Federalist* "might be sometimes influenced by the zeal of advocates." Letter from James Madison to Edward Livingston (Apr. 17, 1824), in 3 *Letters and Other Writings of James Madison, 1816-1828* 436 (J.P. Lippincott 1865).

[13] See *The Federalist Papers* (Clinton Rossiter, ed., 1961).

[14] See, e.g., Randy E. Barnett, *Restoring the Lost Constitution* 100–13 (Princeton 2004). And that goes *a fortiori* for Jay, who didn't even write it. See note 6 and accompanying text.

But what of "original public meaning" originalism? If we care about the original public meaning—of, say, "the executive power" vested by Article II, § 1—shouldn't we consult *all* of the late-eighteenth century's writings on the topic? On this theory, we should not ignore *The Federalist*—just as a judge would not ignore one party's brief. Rather, we should read the Federalists' papers *together with* the Anti-Federalists' papers to elucidate the original public understanding of the Constitution.[15] If we do that, the Anti-Federalists remain relevant to our debates over the Constitution. And that includes the debate over administrative law.

To explain why, I am going to start by talking about who the Anti-Federalists were.

Then I'm going to explain some of their objections to the Constitution. While the omission of a bill of rights was their principal concern, it was far from their only one. They also worried the new federal government would "hollow out" or "melt down" the States and that all government power would be centralized in the national seat.

Finally, I'll discuss their views about executive power and their foreshadowing of our modern debates over the administrative state. The Anti-Federalists worried that "the executive power" vested by the new Constitution would create a new, permanent class of executive branch employees. And the Anti-Federalists worried those permanent government employees would wield enormous power without political accountability. They would become, the Anti-Federalists feared, a new type of aristocratic ruling class that would be disconnected from the concerns of everyday people.

My point is not that the Anti-Federalists necessarily predicted the creation of 20th-century bureaucracy. Nor am I suggesting they

---

[15] Once the reader consults these materials, it is of course possible that they do not elucidate a particular provision of the Constitution. Cf. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 Geo. Wash. L. Rev. 1301 (1998). That's a debate for another day. My point is more modest: To the extent that we read and care about *The Federalist*, we cannot *not* read and *not* care about the Anti-Federalists.

miraculously foresaw what today we call the administrative state. I'm saying only that the Anti-Federalists framed the debate about the meaning of the Constitution's provisions—including Article II. And the themes they sounded in doing so have enduring relevance for the topic of administrative law and any other that turns on the meaning of the Constitution.

I. WHO THE ANTI-FEDERALISTS WERE

We have to start with who the Anti-Federalists were. One reason I wanted to talk about them today is I worry we don't talk about them enough. A corollary, of course, is that you likely don't know anything about them.

The prevailing view for the first 75 years after the Constitution's ratification was that the Anti-Federalists were a bunch of "uneducated and debt-ridden farmers."[16] That's simply untrue.

For example, they included the President of the Continental Congress, Richard Henry Lee. Many believe Lee was the Anti-Federalist author behind the pseudonym Cincinnatus.[17]

Or take the Anti-Federalist Centinel. Many believe his papers were written by the Governor of Pennsylvania, George Bryan, along with his son, Samuel Bryan.[18]

Or the Anti-Federalist Cato. Many believe his papers were written by George Clinton, who was the Governor of New York and later the fourth Vice President of the United States.[19]

---

[16] Cornell, 84 Nw. U. L. Rev. at 43 (cited in note 9) (describing the view of Richard Hildreth in R. Hildreth, 3 *The History of the United States of America* 535 (Harper 1849)).
[17] See *Essays by Cincinnatus*, in Storing, ed., 6 *The Complete Anti-Federalist* 5, 5 (cited in note 7).
[18] See *Letters of Centinel*, in Storing, ed., 2 *The Complete Anti-Federalist* 130, 130 (cited in note 7).
[19] See *Letters of Cato*, in Storing, ed., 2 *The Complete Anti-Federalist* 101, 101 (cited in note 7).

Or Brutus. "The essays of Brutus are among the most important Anti-Federalist writings."[20] And his papers are generally attributed to Robert Yates.[21] Yates was a justice on the New York Supreme Court (and later its chief justice). He also was a deputy from New York to the Constitutional Convention in 1787. Yates famously left the Convention (along with his co-deputy John Lansing) when it became clear the Convention would discard the Articles of Confederation.[22] That left Hamilton to represent New York alone.[23]

Or Agrippa. His essays were written by the Anti-Federalist James Winthrop.[24] "The son of mathematics professor John Winthrop

---

[20] *Essays of Brutus*, in Storing, ed., 2 *The Complete Anti-Federalist* 358, 358 (cited in note 7).

[21] See id. Allen and Lloyd describe Yates as the "presumed" author of the Brutus essays. See *The Essential Antifederalist* at 4 (cited in note 7). More recent scholars have argued instead that Melancton Smith authored them. See Michael Zuckert and Derek Webb, eds., *The Anti-Federalist Writings of the Melancton Smith Circle* (Liberty Fund 2009).

[22] See Robert Yates and John Lansing, *Reasons of Dissent*, in Storing, ed., 2 *The Complete Anti-Federalist* 15, 15 (cited in note 7). New York—like several other States—commissioned its deputies to the Convention to meet "for the sole and express purpose of *revising* the Articles of Confederation." Max Farrand, ed., 3 *Records of the Federal Convention of 1787* 581 (Yale 1911) (Appendix B) (emphasis added). Yates and Lansing apparently believed that was different than replacing them.

[23] New York was the only State not to specify a quorum requirement in its deputies' commission. Compare Farrand, ed., 3 *Records of the Federal Convention of 1787* at 579–81 (cited in note 22) (Appendix B) (no quorum requirement for New York) with, e.g., id. at 560 (Appendix B) (quorum of three for Virginia). That would suggest that Hamilton—when left alone at the Convention—could have voted "aye" or "nay" for New York. For reasons that are not clear, the Convention nevertheless treated New York as "not present" for purposes of voting. See Farrand, 2 *Records of the Federal Convention of 1787* at 641 (cited in note 22) (listing New York and Rhode Island as not present for the final vote on adopting the Constitution). To make things even murkier, the Convention allowed Hamilton to sign the Constitution but apparently to do so only individually (and not on behalf of New York). See id. at 665 (noting the Constitution was signed by "The States of New Hampshire, Massachusetts, Connecticut, *Mr. Hamilton from New York*, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia" (emphasis added)).

[24] See *Letters of Agrippa*, in Storing, ed., 4 *The Complete Anti-Federalist* 68, 68 (cited in note 7).

of Harvard, James became librarian of Harvard in 1770 following his graduation from that institution."[25]

I could go on. But the point should be obvious: This is hardly a group of uneducated and debt-ridden unsophisticates.

Not only were the Anti-Federalists educated in a bookish sense, they were at times progressive (in an eighteenth-century sense). For example, they included some ardent critics of slavery.[26] Take the prominent Virginia congressman and Anti-Federalist George Mason. At the Constitutional Convention—in his own name and without a pseudonym—Mason said:

> Every master of slaves is born a petty tyrant. [Slaves] bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this.

---

[25] Id. "While Harvard librarian, he fought in the Revolution, was postmaster of Cambridge, and served as a volunteer against the Shays insurgents." Id.

[26] See A Countryman from Dutchess County II ¶ 6.6.10 (Nov. 23, 1787) , in Storing, ed., 6 *The Complete Anti-Federalist* 52, 52 (cited in note 7) ("Will this Gentleman [defending the Constitution] say, that the [slaves] do not come within the Discription of 'Mankind?' If he should, will he be believed?"); A Countryman from Dutchess County V ¶ 6.6.10, in id. at 62 (arguing the Nation should be forced into "relinquishing every idea of drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants."); Brutus III ¶ 2.9.39, in Storing, ed., 2 *The Complete Anti-Federalist* 377, 378 (cited in note 7) (referring to the slave trade as an "evil" and "inhuman traffic" perpetuated by "unfeeling, unprincipled, barbarous, and avaricious wretches."); Centinel III ¶ 2.7.76, in Storing, ed., 2 *The Complete Anti-Federalist* 154, 160 (cited in note 7) ("We are told that the objects of [Art. I, § 9, cl. 1], are slaves, and that it is inserted to secure to the southern states, the right of introducing [slaves] for twenty-one years to come, against the declared sense of the other states to put an end to an odious traffic in the human species; which is especially scandalous and inconsistent in a people, who have asserted their own liberty by the sword, and which dangerously enfeebles the districts, wherein the laborers are bondmen. The words dark and ambiguous; such as no plain man of common sense would have used, are evidently chosen to conceal from Europe, that in this enlightened country, the practice of slavery has its advocates among men in the highest stations.").

> By an inevitable chain of causes & effects[,] providence punishes national sins, by national calamities.[27]

The only way to make that *more* prescient would be to predict the start date of the Civil War.

I'm not saying the Anti-Federalists were necessarily more anti-slavery than their Federalist counterparts. But I am saying the Anti-Federalists were principled in their objections. And—unlike their Federalist counterparts—the Anti-Federalists were unwilling to compromise on the question. As the great Anti-Federalist scholar Herbert Storing wrote: "The Anti-Federalists were less easily persuaded that questions of politics can be freed from questions of conscience."[28]

The Anti-Federalists also included in their number at least one woman—Mercy Otis Warren. She wrote "Observations on the New Constitution, and on the Federal and State Conventions" under the pseudonym "A Columbian Patriot."[29] The pamphlet was originally printed in Boston, but was also circulated in Philadelphia, New York, and North Carolina. Many believed that Elbridge Gerry (the fifth Vice President of the United States) was the author until the 1930s, when letters were discovered that proved Warren was the author. And this was hardly her only piece of influential political theory. She also wrote a poem about the Boston Tea Party—which stirred up considerable patriotic fervor—and a three-volume history of the American Revolution.[30]

---

[27] James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 444 (Oxford 1920) (Gaillard Hunt and James Brown Scott, eds.) (quoting Mason).

[28] Storing, *What the Anti-Federalists Were For* at 76 n. 20 (cited in note 7).

[29] See *Observations on the New Constitution, And on the Federal and State Conventions. By a Columbian Patriot*, in Storing, ed., 4 *The Complete Anti-Federalist* 270, 270 (cited in note 7).

[30] See id.; Mercy Otis Warren, *The Plays and Poems of Mercy Otis Warren* (Scholars' Facsimiles 1980) (Benjamin Franklin, ed.); Mercy Otis Warren, *History of the Rise, Progress and Termination of the American Revolution Interspersed with Biographical, Political and Moral Observations* (Liberty 1988) (Lester H. Cohen, ed.).

So for all these reasons—for their positions of influence, their prognostications, their principles, and their influential contributions to political theory—the men and women who wrote the Anti-Federalist Papers should be remembered as "Founders" and "Framers."

II. WHY THE ANTI-FEDERALISTS WORRIED

Perhaps the most important reason to remember the Anti-Federalists, however, is their *worries*. Those worries framed the debate over the Constitution and hence elucidate its public meaning.

One could reasonably argue the most influential paper written about the proposed Constitution was published in the *New York Journal* on October 18, 1787.[31] It was not written by Madison, Hamilton, or Jay. Rather, it was an Anti-Federalist essay signed "Brutus."[32]

Brutus I is important for four different reasons. The first is when it was published. Recall the Constitution was signed on September 17, 1787. And from Philadelphia, it went to the various States for ratification. Almost exactly one month after the Constitution was signed, Brutus published his first paper opposing the proposed Constitution. The timing is important because he beat his Federalist competitors to the press. The first Federalist paper did not see the light of day until almost two weeks later.

The second reason Brutus I is important is where it was published: New York. Many thought New York would be the key battleground for ratification. And that's where all 85 Federalist Papers would ultimately be published. Perhaps Madison, Hamilton, and Jay would've chosen New York on their own—but it is striking that Brutus was there first and forced his opponents to respond on his chosen political battlefield.

---

[31] Brutus I, in Storing, ed., 2 *The Complete Anti-Federalist* 363, 363–72 (cited in note 7).
[32] On the identity of Brutus, see note 21 and accompanying text.

The third reason Brutus I is important is how it was signed. The author chose the pseudonym "Brutus" after Lucius Junius Brutus. That great leader overthrew his uncle, the last king of Rome, and instituted the Roman republic in 509 BC.[33] Brutus was elected one of the first consuls of Rome.[34] Legend has it that his first official act was to require everyone to swear an oath to never allow another king in Rome.[35] His name was thus emblematic of the Roman republic and a fear of tyranny.

Serving alongside Brutus as consul was another Roman revolutionary whose name will no doubt be familiar to scholars of the Founding: Publius Valerius Publicola.[36] The Roman consul Publius is known to history as a champion of the rights of the common people.[37] The name Publius, of course, is the pseudonym chosen by Madison, Hamilton, and Jay for each paper in *The Federalist*.[38] Perhaps the Federalists would've chosen "Publius" on their own. But it seems more likely that here too—as with the timing, the location, and now with the signature block—the Federalists were on the defensive. They were fighting on the Anti-Federalists' turf.

---

[33] See Alfred J. Church, *Stories from Livy* 72–90 (Scribner Welford 1882).

[34] During the Roman Republic, two consuls were elected to concurrently serve a one-year term. See Thomas Erskine May, *Democracy in Europe: A History* 139–40 (W.J. Widdleton 1877). For a succinct summary of the office of the Roman consul and other Roman magistracies, see Eric A. Posner, *The Constitution of the Roman Republic: A Political Economy Perspective* *6–7, (John M. Olin Program in Law and Economics Working Paper No. 540, Nov. 2010), available at https://bit.ly/2XffQwv.

[35] See Church, *Stories from Livy* at 72–90 (cited in note 33).

[36] Initially, the other consul during the first consulate was Lucius Tarquinius Collatinus. But because of his connection to the now-deposed royal family—the Tarquins—he was forced to resign his office and flee Rome partway through the term. See Robert S. Broughton, 1 *The Magistrates of the Roman Republic* 1–2 (American Philological 1951); Church, *Stories from Livy* at 72–90 (cited in note 33). Publius was elected to complete the term in his place. See Broughton, 1 *Magistrates* at 2.

[37] See Broughton, 1 *Magistrates* at 2 (cited in note 36); Louis J. Sirico, Jr., The Federalist *and the Lessons of Rome*, 75 Miss. L. J. 431, 469 (2006).

[38] See *The Federalist Papers* (cited in note 13); Sirico, 75 Miss. L. J. at 433 (cited in note 37).

Finally, Brutus I is important for what it said. Brutus argued that the purpose of the new Constitution was to consolidate the States into a single national government. He says the Constitution's drafters *pretend* that it confers limited powers.[39] In reality, Brutus says, the powers are "great and uncontroulable."[40] He points in particular to the taxing power, the Necessary and Proper Clause, the judicial power, and the Supremacy Clause.[41]

These powers are so sweeping, Brutus argues, that the States will necessarily fade into irrelevance. The new federal government will "annihilate all the state governments, and reduce this country to one single government."[42] Or, as Brutus would later put it, the new Constitution in its inevitable operation would "melt down the [S]tates into one entire" general, national government.[43]

Then, once all of the government's power was consolidated into its National Seat, the principles of free government would be in jeopardy. Why? Because of—you guessed it—the executive power. Brutus said, in "[a] free republic," the execution of the laws "must depend upon the support of its citizens."[44] That's impossible "in a republic so extensive as the United States," because people with vastly different interests—in, say, Georgia and New Hampshire—will make vastly different demands of their "rulers."[45] Those

---

[39] Brutus I ¶ 2.9.5, in Storing, ed., 2 *The Complete Anti-Federalist* 363, 365 (cited in note 7). See also An Old Whig ¶ 3.3.12, in Storing, ed., 3 *The Complete Anti-Federalist* 17, 24 (cited in note 7).

[40] Brutus I ¶ 2.9.9, in Storing, ed., 2 *The Complete Anti-Federalist* 363, 367 (cited in note 7).

[41] See id. ¶¶ 2.9.5–9 at 365–68.

[42] Id. ¶ 2.9.9 at 367.

[43] Brutus XV ¶ 2.9.194 in Storing, ed., 2 *The Complete Anti-Federalist* 437, 441 (cited in note 7); see also Centinel II ¶ 2.7.17, Storing, ed., 2 *The Complete Anti-Federalist* 136, 141 (cited in note 7) (noting the new federal powers are so sweeping "the United States are to be melted down into one empire").

[44] Brutus I ¶ 2.9.18, in Storing, ed., 2 *The Complete Anti-Federalist* 363, 370 (cited in note 7).

[45] See id. ¶ 2.9.18 at 370–371.

competing demands will create competing "faction[s]."[46] Which, in time, will create an ever-more-caustic political environment where "a constant clashing of opinions" and infighting prevents pursuit of a shared, common good.[47] As factions can no longer agree on a single, shared, common good, each faction will feel unable to control a government pulled in opposite directions.[48] This, Brutus said, will create a negative feedback loop, in which the people grow disaffected toward their government, and the government grows "nerveless and inefficient" because it's disconnected from the people. In the end, Brutus predicted, the only winners will be "ambitious and designing men" who will acquire and exercise the executive power for "gratifying their own interest and ambition."[49] The people, he said, will be left powerless "to call them to account for their misconduct, or to prevent their abuse of power."[50]

That's obviously a bleak picture. And I'm not a historian, political theorist, or pundit. So I leave for others to debate and decide whether Brutus was right or wrong. My point is a much more modest one. One of the most-cited and most-quoted papers in *The Federalist*—number 10—is written in direct response to Brutus.[51] In Federalist 10, Madison explains his view that the Constitution will harness "factions," counterbalance them against one another, and hence prevent them from ruining the American experiment.[52] Virtually anyone who's studied *The Federalist* has read Number 10. But if you

---

[46] See id.
[47] Id. ¶ 2.9.16 at 369.
[48] Brutus I ¶ 2.9.18, in Storing, ed., 2 *The Complete Anti-Federalist* 363, 370–71 (cited in note 7)..
[49] Id. ¶¶ 2.9.18, 20 at 371.
[50] Id. ¶ 2.9.20 at 371.
[51] See Federalist 10 (Madison), in *The Federalist* 77–84 (cited in note 13).
[52] See id. at 84 ("The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.").

haven't read it in conjunction with Brutus I, you should worry you're no better off than the judge who read only one party's brief.[53]

III. EXECUTIVE POWER

Ok, you might say—what does any of this have to do with administrative law?

Well, it turns out, Brutus was not the only Anti-Federalist to raise concerns about "the executive power" vested by Article II of the proposed Constitution. Other Anti-Federalists picked up where Brutus left off. And their criticisms of "the executive power" ushered in themes that resonate in debates over the administrative state today. Here—as with innumerable other disputes we might have about the meaning of the Constitution—the Anti-Federalists framed the debate in 1787. And in some ways, they continue to frame the debate today.

The Anti-Federalists voiced three principal concerns about the scope of Article II. The first was permanence. That is, they worried the President would not step down.[54] The 22nd Amendment was not

---

[53] If we read these arguments alongside each other, as they were meant to be read, we quickly discover that Brutus and Publius agreed on a lot. Both authors believed a sprawling country would inevitability lead to the formation of factions, for example. But they parted ways on what followed from that—inefficiency that would rend the country apart or inefficiency that would keep the country together by slowing the machinery of government. Only by understanding where the two sides stood can we fully appreciate just how they diverged.

[54] See, e.g., Luther Martin, Mr. Martin's Information to the General Assembly of the State of Maryland ¶ 2.4.81, in Storing, ed., 2 *The Complete Anti-Federalist* 27, 66 (cited in note 7) ("[T]he best security for liberty was a limited duration and a rotation of office in the chief executive department."); Cato IV ¶ 2.6.25, in Storing, ed., 2 *The Complete Anti-Federalist* 113, 114 (cited in note 7) ("It is remarked by Montesquieu, in treating of republics, that in all magistracies, the greatness of the power must be compensated by the brevity of the duration; and that a longer time than a year, would be dangerous."); *A Farmer and Planter* ¶ 5.2.3, in Storing, ed., 5 *The Complete Anti-Federalist* 74, 76–77 (cited in note 7) ("[A] four-years President will be, in time, a King for life, and after him, his son, or he that has the greatest power among them, will be King also.").

ratified until 1951,[55] so the President could theoretically be re-elected until he died. The Anti-Federalists worried that result would make the President a rough approximation of a monarch.

Their second concern was lack of responsiveness to the people. In particular, they worried the electoral college would make presidents unresponsive to individual voters.[56]

Third, they worried about executive officers wielding legislative powers. In particular, the Anti-Federalists were bothered that the Vice President was both an executive officer and the president of the Senate.[57]

---

[55] See Certification of Amendment to Constitution of the United States Relating to Terms of Office of the President, 16 Fed. Reg. 2019 (1951).

[56] See, e.g., Cato IV ¶ 2.6.30, in Storing, ed., 2 *The Complete Anti-Federalist* 113, 115 (cited in note 7) ("It is a maxim in republics, that the representative of the people should be of their immediate choice; but by the manner in which the president is chosen he arrives to this office at the fourth or fifth hand, nor does the highest vote, in the way he is elected, determine the choice—for it is only necessary that he should be taken from the highest of five, who may have a plurality of votes."); Republicus ¶ 5.13.13, in Storing, ed., 5 *The Complete Anti-Federalist* 165, 168 (cited in note 7) ("Is it necessary, is it rational, that the sacred rights of mankind should thus dwindle down to Electors of electors, and those again electors of other electors?").

[57] See, e.g., Cincinnatus IV ¶ 6.1.27, in Storing, ed., 6 *The Complete Anti-Federalist* 17, 19 (cited in note 7) ("The union established between them and the vice president, who is made one of the corps, and will therefore be highly animated with the aristocratic spirit of it, furnishes them a powerful shield against popular suspicion and enquiry, he being the second man in the United States who stands highest in the confidence and estimation of the people."); Centinel II ¶ 2.7.51, in Storing, ed., 2 *The Complete Anti-Federalist* 143, 151 (cited in note 7) ("This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the compleat separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive; and again severing the judicial part from the ordinary administrative. 'When the legislative and executive powers (says Montesquieu) are united in the same person, or in the same body of magistrates, there can be no liberty.' "); A Columbian Patriot ¶ 4.28.4, in Storing, ed., 4 *The Complete Anti-Federalist* 270, 276 (cited in note 7) ("The Executive and the Legislative are so dangerously blended as to give just cause of alarm, and every thing relative thereto, is couched in such ambiguous terms—in such vague and indefinite expression, as is a sufficient ground without any other objections, for the reprobation of a system, that the authors dare not hazard to a clear investigation.").

At first blush, these concerns might seem unfounded. After all, presidencies are not permanent. Modern presidential campaigns appeal directly to the voters—not electors—and electors' "defections" are newsworthy precisely because they are rare.[58] And for all of the separation-of-powers cases in the last 230 years that implicate the line between Article I and Article II, I can't think of one that hinged on the fact the Vice President breaks ties in the Senate.[59]

On the other hand, the *themes* underlying these concerns are the same ones we hear today in debates about the administrative state.

Take for example permanency and responsiveness. The Anti-Federalists' concerns did not stop with whether the President would serve in perpetuity and whether the electoral college made sense. The Anti-Federalists also were concerned the new Constitution would create a new class of permanent public jobs for would-be staffers of the executive branch.[60] Given the scope of the executive power, the Anti-Federalists worried, it would take "plenty" of "privileged" people to take these jobs.[61] And over time, the Anti-Federalists predicted, the permanent, privileged public employees in these positions would grow into an "aristocracy" of sorts—their permanent employment and authority would disconnect them from the concerns of and accountability to ordinary Americans.[62]

To understand the Anti-Federalists' concerns over a permanent and unaccountable aristocracy, we have to start with

---

[58] See, e.g., Kiersten Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton* (N.Y. Times, Dec. 19, 2016), archived at https://perma.cc/KNP4-5HW9. ("It is rare for more than one elector to vote against the party's pledged candidate, but it has happened on a few occasions. . . . A single elector has refused to vote for the party's presidential candidate in 11 elections.").

[59] Compare *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), with Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 Nw. U. L. Rev. 1539 (2008).

[60] See Allen and Lloyd, eds., *The Essential Anti-Federalist* at xxiv (cited in note 7) (noting the Anti-Federalists "were suspicious of privilege, and the proposed Constitution appeared to offer plenty of public jobs for the creation of a permanent aristocracy").

[61] Id.

[62] Id.

"Cincinnatus."[63] His pseudonym—like, for example, Brutus's—was an exercise in linguistic jiujitsu. On the surface, it refers to Lucius Quintus Cincinnatus. The ancient Cincinnatus served as a consul of Rome for a brief period in 460 BC.[64] After completing his term, Cincinnatus retired to the countryside. But Rome was invaded in 458 BC by Aequians descending from the Apennine Mountains. An emergency ensued. A group of Senators ran out to Cincinnatus's farm and found him behind his plow.[65] They gave him near-autocratic power to repel the invasion. He achieved total victory at the Battle of Mount Algidus.[66] Then he relinquished power a mere *fifteen days* after receiving it.[67] And having served his country faithfully in its time of crisis, Cincinnatus re-retired to his plow in the countryside. So the name "Cincinnatus" invoked "the ideal of Roman simplicity and patriotism."[68]

To the Anti-Federalists, however, the name had another, much deeper meaning—and it was virtually synonymous with aristocracy. "The Society of the Cincinnati was instituted at the cantonments of the American army on the Hudson [River] on May 10, 1783."[69] At its first meeting, the Society elected George Washington as its president.[70] The group was comprised exclusively of veterans of the Revolutionary War, who passed their membership hereditarily. The members were a veritable who's-who of late-eighteenth century America. And *twenty-three* of thirty-nine signatories to the Constitution were members.[71] George Washington even took breaks

---

[63] On the identity of Cincinnatus, see note 17 and accompanying text.
[64] See Church, *Stories from Livy* at 133–45 (cited in note 33).
[65] See Livy, *History of Rome* 3.26 (Loeb Classical Library 1984) (B.O. Foster, trans.).
[66] Id. 3.28.
[67] Id. 3.29
[68] Edgar Erskine Hume, *The Role of the Society of the Cincinnati in the Birth of the Constitution of the United States*, 5 Pa. Hist. 101, 102 (1938).
[69] Id. at 101; see also id. (noting the Society was named after Cincinnatus).
[70] Id. at 102.
[71] Id. at 105.

during the Constitutional Convention to attend the Society's meetings.[72]

To the Anti-Federalists, the Society of the Cincinnati was the beginning of an American aristocracy. John Adams, Samuel Adams, and Elbridge Gerry all "accused the Cincinnati of an aristocratic conspiracy against the nascent American republic."[73] And "[Mercy Otis] Warren identified the Society as part of a greater Federalist conspiracy for 'erecting a government for the United States, in which should be introduced ranks, privileged orders, and arbitrary powers.'" [74] To the Anti-Federalists, the Society teemed with wealthy, privileged, and powerful men conspiring together in secret[75] to accumulate even more power for their club and its

---

[72] Hume, 5 Pa. Hist. at 105. The parallels between the lives and leaderships of Washington and Cincinnatus are obvious. Both served their countries in times of crisis, both were military leaders, and both surrendered their (extraordinary) powers in peaceful retirement.

[73] Markus Hünemörder, *The Society of the Cincinnati: Conspiracy and Distrust in Early America* 1 (Berghahn 2006).

[74] Id. at 2 (quoting Warren); see also Mercy Otis Warren, 2 *History of the Rise, Progress and Termination of the American Revolution Interspersed with Biographical, Political and Moral Observations* 620 (Liberty Fund 1988) (Lester H. Cohen, ed.) ("[T]his order was a deep laid plan, to beget and perpetuate family grandeur in an aristocratic nobility, which might terminate at last in monarchical tyranny.").

[75] The fact that the Constitutional Convention also met in secret at the same time and in the same city as the Society did nothing to dispel the Anti-Federalists' suspicion. See, e.g., Luther Martin, To the Citizens of the United States ¶ 2.4.7, in Storing, ed., 2 *The Complete Anti-Federalist* 25, 26–27 (cited in note 7); Luther Martin, *Mr. Martin's Information* ¶ 2.4.13, in Storing, ed., 2 *The Complete Anti-Federalist* 27, 28 (cited in note 7); Warren, 2 *History of the Rise, Progress and Termination of the American Revolution* at 657 (cited in note 74). See also Farrand, 1 *Records of the Federal Convention of 1787* at 15 (cited in note 22) (reporting the standing rule for secrecy of the Convention: "That nothing spoken in the House be printed, or otherwise published, or communicated without leave."). At the end of the Convention, Rufus King "suggested that the Journals of the Convention should be either destroyed, or deposited in the custody of [George Washington]. He thought if suffered to be made public, a bad use would be made of them by those who would wish to prevent the adoption of the Constitution." Id. at 648. The Convention voted to preserve the records and give them to Washington. See id.

members. Then they would pass along that accumulated power to their heirs, at the expense of ordinary, hard-working people. If the image painted by the Anti-Federalists was to be believed, the Society more than resembled the English aristocracy so many Anti-Federalists (and Federalists) revolted against.[76] As one scholar put it:

> According to these allegations, the Society planned to establish itself as a hereditary nobility, thus creating a homemade tyranny that would soon extinguish the flame of liberty. With the end of their common struggle for freedom almost in sight after seven years of fighting England to create a new nation, one part of the Founding Fathers effectively accused another of betraying the ideals of the American Revolution.[77]

Thus, by signing his paper "Cincinnatus," the Anti-Federalist re-appropriated the name and railed against aristocracy.[78]

---

[76] Roman history—with which the Anti-Federalists were obviously familiar—is full of parallels to military rulers who passed power to their heirs. For hundreds of years after the reign of Augustus and the fall of the Roman Republic, Rome jockeyed back and forth between individuals vying for the imperial purple. In AD 193, Rome saw five different emperors ascend and perish within a single year. See Edward Gibbon, 1 *The Decline and Fall of the Roman Empire* 85–101 (Modern Library 1977) (originally published 1776). In AD 238, six different emperors held and lost the crown. Id. at 151–64. Many of these aspirants had similar beginnings: They were military commanders or provincial governors who would pay a large "donation" to the Roman army, seize the throne with force of arms, and install their sons as co-emperors. See id. at 111–12 (Severus installed his sons Caracalla and Geta), 153 (Gordian I installed his son Gordian II). The Anti-Federalist picture of the Society—blending military victory, hereditary succession, and tyranny—echoed this history.

[77] Hünemörder, *The Society of the Cincinnati* at 1 (cited in note 73).

[78] The Anti-Federalist Cincinnatus worried at length that the new Constitution—like the Society bearing his name—would "produce a baneful aristocracy." Cincinnatus IV ¶ 6.1.34, in Storing, ed., 6 *The Complete Anti-Federalist* 17, 22 (cited in note 7); see also id. ¶¶ 6.1.27–34 at 18–22; Cincinnatus V ¶ 6.1.35, in Storing, ed., 6 *The Complete Anti-Federalist* 22, 22–23 (cited in note 7). There is a deep irony in the Anti-Federalist view that a society named after a humble Roman farmer was the breeding ground for

The Anti-Federalists connected their fear of aristocracy to the executive power vested by the Constitution. Take for example the Anti-Federalist essay signed by "A Federalist." Like Cincinnatus, A Federalist re-appropriated the name taken by his or her opponents.[79] Then the author explained the Constitution's most ardent supporters were the same people who stood to benefit from it. According to A Federalist, the wealthy, privileged, and (already) powerful would be able to move to the Nation's Capital, get jobs working for the new federal government, and use their sinecures for private enrichment at public expense:

> [T]hese consist generally, of the noble order of C[incinnatu]s, holders of public securities, men of great wealth and expectations of public office, B[an]k[er]s and L[aw]y[er]s: these with their train of dependents from the Aristocratick combination—the L[aw]y[e]r[s] in particular, keep up an incessant declamation for its adoption, like greedy gudgeons

---

American aristocracy. See Warren, 2 *History of the Rise, Progress and Termination of the American Revolution* at 618 (cited in note 74).

In the eighteenth century—and most would say today—Cincinnatus was best known as the farmer who returned to his plow: an emblem of civic virtue. That's what he symbolized to both Federalists and Anti-Federalists. But there's another irony: Despite his personal humility, the Roman Cincinnatus was a patrician and unapologetic member of the Roman elite. As consul, he opposed enacting written laws that would bind patricians and plebeians alike. See Dionysius of Halicarnassus, *Roman Antiquities* 10.3, 10.18–19 (Loeb Classical Library 1986) (Earnest Cary, trans.). During his legendary 458 B.C. dictatorship, the plebeians "thought the powers annexed to his office too unlimited, and the man still more arbitrary." Livy, *History of Rome* 3.26 (cited in note 65). And years later, Cincinnatus may have been made dictator a second time in response to an incipient plebian rebellion. See id. at 4.13–14; but see Dionysius, *Roman Antiquities* 12.1–2 (describing the same revolutionary plot without mention of Cincinnatus).

[79] But see note 7 (noting the debate over whether the Federalists took the name through "political deceit").

> they long to satiate their voracious stomacks with the golden bait.[80]

A Federalist also worried these "gudgeons"[81] would create an ever-increasing number of "tribunals," sufficient to "find employment for ten times their present numbers; these are the LOAVES AND FISHES for which they hunger."[82] While the gudgeons increase their tribunals, accumulate more power, and form a train of dependents on the public fisc, "they will probably find it suited to THEIR HABITS, if not to the HABITS OF THE PEOPLE."[83]

But perhaps no Anti-Federalist fretted more about the executive power than "Cato." Scholars generally agree Cato's papers were written by New York Governor George Clinton.[84] The pseudonym refers to Cato the Younger, who famously committed suicide rather than live under Julius Caesar's rule.[85] He was lionized in Addison's 1710 play *Cato, a Tragedy*, as a martyr to the dying Roman republican

---

[80] A Federalist ¶ 4.7.1, in Storing, ed., 4 *The Complete Anti-Federalist* 117, 118 (cited in note 7).

[81] A "gudgeon" is a small, bottom-dwelling fish with no teeth and spineless fins. See 6 *Encyclopaedia Americana: A Popular Dictionary of Arts, Sciences, Literature, History, Politics, and Biography* 83 (Forgotten Books 2017) (Francis Lieber ed.); see also Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "gudgeon" as "1. A small fish found in brooks and rivers, easily caught, and therefore made a proverbial name for a man easily cheated. . . . 2. Something to be caught to a man's own disadvantage; a bait; an allurement."); Thomas Dyche and William Pardon, *A New General English Dictionary* (14th ed. 1771) (defining "gudgeon" as "also a nick-name given to a person that is imposed upon, or cheated by others").

[82] A Federalist ¶ 4.7.1, in Storing, ed., 4 *The Complete Anti-Federalist* 117, 118 (cited in note 7); see also Matthew 14:13–21 (describing how Jesus miraculously multiplied five loaves of bread and two fishes to feed 5,000 hungry men).

[83] A Federalist ¶ 4.7.1, in Storing, ed., 4 *The Complete Anti-Federalist* 117, 118 (cited in note 7).

[84] See *Letters of Cato*, in Storing, ed., 2 *The Complete Anti-Federalist* 101, 101 (cited in note 7).

[85] See Cato the Younger ¶ 68–71, in 8 *Plutarch's Lives* 401–07 (Loeb Classical Library 1989) (Bernadotte Perrin, trans.).

cause.[86] And George Washington had the play performed for the men encamped at Valley Forge.[87] Therefore the name "Cato" and its history oozed skepticism of executive power.

Echoing A Federalist, Cato worried that Article II would enable the president "to create a numerous train of dependents,"[88] and his "eminent magisterial situation will attach many adherents to him, and he will be surrounded by expectants and courtiers."[89] Cato also fretted that the scope of Article II was so vast it would inevitably generate "a dangerous council . . . collected from the great officers of state" and composed of "favorites and flatterers."[90]

He went on to worry that "[t]he ten miles square, which is to become the seat of government, will of course be the place of residence for the president and the great officers of state."[91] He said the power-dense Capital would turn into the "court of the president"—just like England's monarchs had royal courts that acted as executive auxiliaries for enforcing law.[92]

Moreover, Cato said, this vast array of people who will serve in these administrative functions will be set apart from the rest of the country in more ways than just geography. They'll also have their own "language and manners."[93] They'll be united "in adulation to

---

[86] See Joseph Addison, *Cato: A Tragedy* (Liberty Fund 2004) (originally published 1710).
[87] See Mark Evans Bryan, *"Slideing into Monarchical extravagance": Cato at Valley Forge and the Testimony of William Bradford Jr.*, 67 Wm. & Mary Q. 123 (2010).
[88] Compare with the text accompanying note 80.
[89] Cato IV ¶ 2.6.25, in Storing, ed., 2 *The Complete Anti-Federalist* 113, 114 (cited in note 7); see also George Mason, Objections to the Constitution of Government Formed by the Convention ¶ 2.2.6, in Storing, ed., 2 *The Complete Anti-Federalist* 11, 12 (cited in note 7).
[90] Cato V ¶ 2.6.33, in Storing, ed., 2 *The Complete Anti-Federalist* 116, 116 (cited in note 7); see also Mason, *Objections to the Constitution* ¶ 2.2.6, in Storing, ed., 2 *The Complete Anti-Federalist* 11, 12 (cited in note 7).
[91] Cato IV ¶ 2.6.27, in Storing, ed., 2 *The Complete Anti-Federalist* 113, 114 (cited in note 7).
[92] Id.
[93] Id ¶ 2.6.28 at 115.

people of fortune and power."[94] And hence, Cato concluded, they will form their own type of aristocracy—this thick population of executive branch auxiliaries will be separated from those "*meanly born*"—i.e., normal people—and unaccountable to them.[95] They'll have extraordinary powers that derive from the president. Yet they won't be accountable. Cato's principal concern with this aristocracy of sorts was its permanence—which seems to violate, he said, Montesquieu's principle that "in all magistracies, the greatness of the power must be compensated by the brevity of the duration."[96]

Given all of that, what might Cato say about the large group of people who cycle in and out of administration jobs every four years? What might he say about the even larger group of people who are permanently employed in administrative agencies? What might he say about the language, manners, and culture of these groups and how the "inside-the-beltway" mindset differs from the one outside it?[97]

Or take responsiveness. What would Cato and the other Anti-Federalists say about the responsiveness of administrative agencies to voters? After all, agency heads don't stand for election. What's more, *independent* agencies are designed precisely to protect against influence by the one executive (the President) who does stand for election.[98] And one of the principal justifications for administrative

---

[94] Id.

[95] Cato IV ¶ 2.6.28, in Storing, ed., 2 *The Complete Anti-Federalist* 113, 115 (cited in note 7).

[96] Id. ¶ 2.6.25 at 114.

[97] See, e.g., Louis Jaffe, *Judicial Control of Administrative Action* (Little Brown 1965) (urging deference for agency expertise).

[98] See, e.g., Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1131–33 (2000) (a need for "apolitical expertise" led to the original creation of independent agencies); *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) ("The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.").

rulemaking is that it's easier than passing laws that must be approved by elected officials.[99]

Or the separation of powers. If the Anti-Federalists were worried about mixing legislative and executive power, what would they say about administrative agencies that write rules, enforce them, and adjudicate violations of them?[100] Or the non-delegation doctrine?[101]

I'm not saying the Anti-Federalists were right to worry. Nor am I suggesting any strand of modern debate is right or wrong based on what the Anti-Federalists wrote. Again, my point is much more modest. It's that few—perhaps none—of the themes we discuss today are really new. Most or all of them have roots that run deeper

---

[99] See, e.g., James M. Landis, *The Administrative Process* 1 (Yale 1938) ("In terms of political theory, the administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems."); id. at 2 ("The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government.").

[100] Take, for example, the Securities and Exchange Commission. Created through the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, the Commission is tasked with enforcement of the federal securities laws, see *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018). Congress has given it broad authority to promulgate regulations. See, e.g., 15 U.S.C. § 77s. It investigates potential violations of the securities laws and brings enforcement actions against violators. See 17 C.F.R. § 202.5. Sometimes it brings these actions in federal court, 15 U.S.C. § 78u(d), but it has another option. See 17 C.F.R. § 202.5(b). It can bring an "administrative proceeding" over which—pursuant to a regulation it promulgated—the Commission "itself" may "preside." *Lucia*, 138 S. Ct. at 2049 (citing 17 C.F.R. § 201.110); see also 17 C.F.R § 202.5(b). If it finds a violation, the Commission may punish the violator. See 15 U.S.C. § 78u-2.

[101] In *Gundy v. United States*, the Supreme Court granted certiorari on the question whether the Sex Offender Registration and Notification Act unconstitutionally delegates authority to the Attorney General to define crimes by regulation. A plurality concluded it did not. See *Gundy v. United States*, 139 S. Ct. 2116, 212830 (2019) (plurality); id. at 2130–31 (Alito concurring in the judgment). But four justices expressed serious doubts about modern nondelegation doctrine's "capacious" allowances. See id. at 2131 (Alito concurring in the judgment); id. at 2131–48 (Gorsuch dissenting). The three dissenters argued our present-day nondelegation doctrine reflects "an understanding of the Constitution at war with its text and history." Id. at 2131 (Gorsuch dissenting).

than the Constitution itself. And the debates we have today would be much richer if we considered *both* sides of the Founders' debates.