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Tabitha Kempf
Catholic University of America (Student), kempf@cua.edu

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Cover Page Footnote

J.D. Candidate, Catholic University of America, Columbus School of Law, Class of 2022. I owe my sincere thanks to Professor Jeremy Kidd for his creative insight and substantive feedback throughout the drafting process and to Emmett Whelan, '21 for his helpful comments on multiple versions of this article. I also thank Professor Philip Hamburger and the team at the New Civil Liberties Alliance for being a source of enduring inspiration.

ADMINISTRATIVE APPARITION: RESURRECTING THE MODERN ADMINISTRATIVE STATE'S LEGITIMACY CRISIS WITH AGENCY LAW ANALYSIS

Tabitha M. Kempf[+]

There is an enduring discord among academic and political pundits over the state of modern American government, with much focus on the ever-expanding host of federal agencies and their increasing regulatory, investigative, enforcement, and adjudicatory authority. The growing conglomerate of federal agencies, often unfavorably regarded as the "administrative state," has invited decades of debate over the validity and proper scope of this current mode of government. Advocates for and against the administrative state are numerous, with most making traditional constitutional arguments to justify or delegitimize the current establishment. Others make philosophical, moral, or practical arguments in support or opposition. Though some contest it, the administrative state faces a crisis of legitimacy. This article addresses what is described here as the "Approval Defense," an argument that justifies the administrative state on grounds that, even if unconstitutional, all three branches of federal government and the public have subsequently approved of our modern form of government, so it is legitimate on that basis. In essence, the Approval Defense's claim of legitimacy is one of ratification. Using similar agency law principles, this article seeks to demonstrate the flaws with a justification based on ratification and show that until there has been an adequate explanation of its lawful basis, the administrative state's legitimacy crisis will simply not go to its grave.

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INTRODUCTION

There is an enduring discord among academic and political pundits over the state of modern American government, with much of the contention around its legal basis and apparent need for reform.[1] Specifically, debate continues over the legitimacy of the ever-expanding host of federal administrative agencies—often unfavorably regarded as the "administrative state"—and skepticism persists over these agencies' increasing amounts of regulatory, investigative, enforcement, and adjudicatory authority.[2] With the U.S. Constitution serving as

1. RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 9–18 (2020) [hereinafter EPSTEIN, DUBIOUS MORALITY].

2. The term "Administrative State," mostly used by detractors of the regime, generally refers to the collection of federal executive branch agencies "exercising the power to create, adjudicate, and enforce their own rules" in their charge to regulate specific areas of the American social order. BALLOTPEDIA, *Administrative State*, *https://ballotpedia.org/Administrative_state* (last visited Oct. 18, 2020). State agencies may also be included in the scope of the "Administrative State,"

the structural blueprint for our American system of government, the fight over the administrative state's legitimacy has primarily, and quite naturally, taken *constitutional* form.[3] However, to comprehend the scope and intensity of the present discussion, it is important to recognize that this decades-long debate is not simply an academic escapade into the interstices of constitutional law doctrine. The primary reason the debate has endured and is so contentious is that the administrative state's legitimacy seems to be one of the primary venues for the ongoing Conservative-Progressive debate over the proper purpose and format of government.[4] In other words, it is a venue for debate over political theory. Controversy also arises over the administrative state's perceived value, or detriment, to the American public.[5] At the outset then, it must be noted that the administrative state debate consists not only of constitutionally derived arguments, but also those of deeply philosophical, theoretical, practical, and moral arguments about how, and on what basis, society should be organized.[6]

This article does not respond to or analyze the mainstream constitutional arguments for and against the administrative state. Instead of wielding the usual constitutional law and doctrinal arguments, the article addresses a single agency law-derived defense of the modern administrative state, then uses those same agency law principles to analyze whether such an argument for legitimacy is viable. In doing so, this article's small task is to confront yet another defense of the administrative state and, hopefully, add one non-traditional arrow to the quiver of those in the anti-administrativist camp who still have a long fight ahead of them in the effort to slay this administrative behemoth.

Part I introduces the modern administrative state and provides a brief overview of its historic and contentious discourse, laying out a high-level view of the opposing sides. Part II describes a single argument in support of the

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depending on usage; but for purposes of this article, the term will refer solely to federal government agencies, broadly defined.

3. *See infra* Part I.

4. Particular philosophical arguments about the proper function of government, quite obviously, gave rise to the birth of the nation but have evolved drastically over time, with a drastic shift in ideologies occurring at the early twentieth century dawn of the Progressive Era. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776); THE FEDERALIST NO. 51 (James Madison); WOODROW WILSON, *What is Progress? in* THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 33–54 (1913). This change in political theory, while widely adopted—as evidenced in the explosion of the administrative state and popularity of Progressive political platform—has also roused a Conservative philosophical response. Jonathan O'Neill, *The First Conservatives: The Constitutional Challenge to Progressivism*, THE HERITAGE FOUNDATION, 39 FIRST PRINCIPLES SERIES 1–3 (July 5, 2011), https://www.heritage.org/political-process/report/the-first-conservatives-the-constitutional-challenge-progressivism. Hence the ongoing debate. And while this article's scope does not include any in-depth discussion of the political theories that form the basis of this ongoing debate, simply recognizing that these clashing theories underlie the opposing arguments may be helpful for finding one's bearings within the conversation.

5. *See infra* notes 17–22 and accompanying text.

6. *See supra* note 5; *see infra* note 24 and accompanying text.

administrative state's legitimacy—what is herein referred to as the "Approval Defense." Part III sets up the contextual framework of the article by articulating and then applying basic agency law principles to modern American government, thus framing the conversation about the administrative state in agency law terms. Part IV analyzes the Approval Defense, arguing that it is essentially one of ratification, and then critiques the defense's theory of and purported evidence of ratification. Ultimately, by applying agency law principles to the problem, this article argues that an assertion of the administrative state's legitimacy on the grounds that it has been ratified by the State and the general public violates basic agency law principles, lacks sufficient evidence, and is therefore ultimately unpersuasive.

I. AN INTRODUCTION TO THE ADMINISTRATIVE STATE AND RELATED ACADEMIC DISCOURSE

To understand the fervency of the ongoing administrative state debate, it may be helpful to review the basic contours of the modern-day administrative regime. A few facts are particularly insightful. As an initial matter, the United States federal government is—to some, alarmingly—so large that it is unquantifiable. There is no authoritative count of how many federal agencies currently exist—even from the federal agency specifically tasked with promoting the administrative regime's fairness and efficiency.[7] Equally astounding is the total costs associated with the administrative state, which amount to thirty percent of the entire U.S. economy's spending.[8] This fiscal burden arises, in part, from the nearly incalculable number of annually enacted federal regulations, all of which hold legal implications for the public. In a light regulatory output year, collectively federal agencies enact "only" about three-thousand final rules, or

7. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *About, https://www.acus.gov/* (last visited Nov. 19, 2021); David E. Lewis & Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 14–15 (2012), https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINparaAL_May%202013.pdf ("[T]here is no authoritative list of government agencies."). Part of the difficulty might stem from the lack of any formally recognized definition of the term "agency." *See*, *e.g.*, Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971) ("The statutory definition of 'agency' is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."); *see* Lewis & Selin, *supra*, at 13–16 (explaining that neither government, the courts, nor regulated parties know how to define the term "agency" as used by the Administrative Procedure Act).

8. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTERPRISE INSTITUTE, 3 (2020), https://cei.org/sites/default/files/Ten_Thousand_Commandments_2018.pdf. For additional statistics, *see id.* (noting that "[i]f it were a country, U.S. regulation would be the world's eighth-largest economy [not counting the U.S. itself], ranking behind India and ahead of Italy" and costing the average American household more than it spends on "health care, food, transportation, entertainment, apparel, services, and savings," among other facts).

approximately seventy-thousand pages of regulatory content every year.[9] For reference, that number exceeds Congress's annual bipartisan legislative output by *twenty-eight times*.[10] As the Department of Justice put it, "today, an entire regulatory apparatus lays claim to an extraordinary amount of private resources, imposing costs that are as consequential as the costs of taxes for the private parties who must bear them."[11]

But the administrative state is not controversial merely for its size, regulatory output, or corresponding fiscal burden imposed on the American public. With so many regulations enacted each year, private citizens' and corporations' risk of facing a federal investigation, enforcement action, or lawsuit is proportionately enlarged.[12] And not just theoretically. In fact, "[a]gencies now adjudicate *most* of the legal disputes in the federal system. A citizen is *ten times more likely* to be tried by an agency than by an actual court."[13] And this statistic is concerning because administrative adjudications are not, in practice, subject to all the same constitutional protections otherwise afforded to defendants in a traditional Article III court.[14] Notwithstanding one's constitutional or philosophical objections to the administrative state, that Americans are increasingly subject to myriad rules and regulations issued by an unquantifiable conglomerate of federal agencies that exact astonishing amounts of public resources and impose civil and criminal sanctions—in some instances for

9. *Id.* at 4, 8; *see id.* at 25 fig. 9. And these numbers say nothing of the "non-binding" guidance documents and "informal" regulatory statements the agencies put out each year.

10. *Id.* at 4. For an immediate count on the number of promulgated and pending federal regulations, see BALLOTPEDIA, *The Administrative State Project*, https://ballotpedia.org/The_Administrative_State_Project (last visited Oct. 18, 2020).

11. U.S. DEP'T OF JUST., MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 2 (2020), https://www.justice.gov/file/1302321/download.

12. For an alarming, and entertaining, education into just how absurdly riddled the average American's day-to-day existence is with still-valid federal regulations carrying the threat of criminal sanctions, *see* MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019).

13. *The Administrative State: An Examination of Federal Rulemaking: Hearing Before the S. Comm. on Homeland Sec. and Gov. Affs.*, 114th Cong. 52 (2016) (statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), *https://www.govinfo.gov/content/pkg/CHRG-114shrg23705/pdf/CHRG-114shrg23705.pdf*.

14. *See generally* Todd Gaziano, et al., *The Regulatory State's Due Process Deficits: Nine Case Studies Highlight the Most Common Agency Failings*, https://pacificlegal.org/wp-content/uploads/2020/05/The-Regulatory-State%E2%80%99s-Due-Process-Deficits-May-2020.pdf (last visited July 14, 2020) (illustrating the multiple ways in which agency adjudications fail to satisfy basic due process requirements).

completely innocuous behavior[15]—is enough to raise a raucous debate. And it has.[16]

The controversy over the administrative state's legitimacy is a historic battle that began well over a century ago with the Progressive push for a modern, less constitutionally-constrained form of government.[17] The fight, having its apparent apex in the mid-1930s Supreme Court revolution,[18] has garnered immense controversy that persists to this day at the highest levels of legal academia and political discourse.[19] On one side of the divide are those who generally favor the current administrative arrangement, who defend its legitimacy as necessary for regulating a complex society, for its benefit to the public welfare, and who dismiss its constitutional critiques on the grounds that the nondelegation doctrine is unmoored from any legitimate constitutional interpretation.[20] On the other side stand the opponents of the administrative regime, who generally fall somewhere along the classical liberal spectrum and have kept the debate alive despite their challengers' desire to "put [it] to rest

15. *See*, *e.g.*, A Crime a Day (@CrimeADay), TWITTER (July 6, 2020, 10:09 PM), https://twitter.com/CrimeADay/status/1280323075439984640 ("21 USC §§610, 676 & 9 CFR §319.306 make it a federal crime to sell spaghetti with meatballs and sauce without prominently declaring the presence of the sauce.").

16. EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 9–18; Philip Wallach, *The Administrative State's Legitimacy Crisis*, BROOKINGS INSTITUTION (Apr. 2016), https://www.brookings.edu/research/the-administrative-states-legitimacy-crisis/; Adrian Vermeule, *What Legitimacy Crisis?* (May 9, 2016), https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis.

17. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 16 (2014); WILSON, *supra* note 4, at 33–54.

18. *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 1–3 (2006).

19. EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 9–18.

20. EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 9–18.; HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 16–19; Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q., 197, 199–201 (1887), https://www.jstor.org/stable/2139277 (making the foundational Progressive argument for the necessity of administrative government in an increasingly complex society); Vermeule, *What Legitimacy Crisis?*, *supra* note 16 (pointing to some evidence that suggests the administrative state supports robust societal-level happiness and greater general welfare); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUMBIA L. REV. (forthcoming 2021) (manuscript at 1) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154*)* (refuting the claim that the nondelegation doctrine inheres in the Constitution); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1928 (2018) ("Some versions of this concern have rested on novel constitutional theories, often rooted in controversial understandings of Articles I, II, and III."); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380–81 (2017) (challenging the "narrative" that the nondelegation doctrine ever served as a valid check on Congressional delegations of power); Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547, 1548, 1556 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2012)) (considering the nondelegation doctrine a "legal fiction"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("[T]here just is no constitutional nondelegation rule, nor has there ever been.").

once and for all, in an unmarked grave."[21] As noted at the outset, in addition to pragmatic considerations, these anti-administrativist critics raise a host of constitutional challenges, arguing among other things "that administrative law violates the separation of powers, bicameralism, due process, judicial independence, and jury rights."[22] All of these constitutionally derived arguments are vital to the critique of the administrative state and serve as the locus of the debate. But again, this article will not follow in that usual constitutional vein of analysis. Instead, this article focuses on a single defense of the administrative state—one that essentially lays aside the constitutional question and grounds its theory of legitimacy in assertions of widespread State and public approval—and addresses that argument on those terms. To that argument we now turn.

II. THE APPROVAL DEFENSE: DO STATE AND PUBLIC APPROVAL LEGITIMIZE THE ADMINISTRATIVE STATE?

Amidst all the clamor of this legitimacy crisis,[23] arguments for and against the administrative state seem to crop up in any place the seeds of discourse might scatter. These arguments most frequently arise in the constitutional context, but also find their bases in political theory, morality, or pure pragmatism.[24] One such argument—which has found its way into the crosshairs of this particular author's analytical sights—will be called here the "Approval Defense" for its central assertion that widespread State and public *approval* is what legitimizes the administrative state, notwithstanding constitutional objections.[25] Perhaps because it is not situated within the common constitutional framework for debate

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21. Posner & Vermeule, *supra* note 20, at 1723; HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 15.

22. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 15–16 (citing several influential scholars who have challenged the unconstitutionality of the administrative state including, among others, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 13 (1993); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 143–44 (1969)).

23. Which, it should be noted, its existence some flatly deny and others consider an embarrassment. *See* Vermeule, *What Legitimacy Crisis?*, *supra* note 16; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997).

24. *See* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 1–3 (2020).

25. *See* Vermeule, *What Legitimacy Crisis?*, *supra* note 16; *see also* SUNSTEIN & VERMEULE, *supra* note 24, at 143–44; *see also* Cynthia R. Farina, *The Administrative State and the Constitution: Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 101–02 (2010) [hereinafter Farina, *Deconstructing Nondelegation*] (making arguments that rely similarly on public opinion as grounds for the administrative state's legitimacy).

or because it is still fairly juvenile in its development—appearing briefly in only a handful of places—the Approval Defense is not yet a dominant theory proffered in support of the modern federal government's validity.[26] But even if not yet a prominent defense, it still holds great potential influence in both the academy and the court of public opinion. This article seeks to analyze the defense's viability before it gets that far.

The Approval Defense, in very basic form, can be summarized as follows: (1) assuming the administrative state's constitutional legitimacy is even open to question, (2) the State—through its combined, historic and collectively bipartisan acts of Congress, the Presidency, and the Courts—gave birth to and continues to validate the administrative state's existence; (3) moreover, the public has widely "approved" of the administrative state in its current formulation; thus, the combination of State and public approval serves to legitimize the administrative state and cure any constitutional infirmity it might otherwise suffer.[27] This argument is primarily, though not exclusively, advocated by Professor Adrian Vermeule.[28] Importantly, it is worth noting that Professor Vermeule does not concede the initial component of the Approval Defense outlined above—namely, that the question of the administrative state's constitutionality *is* open to debate.[29] In fact, he makes the opposite argument based on a particular conception of nondelegation, that, while not the focus of this article, must be addressed briefly below.[30]

A. Nondelegation & The Approval Defense: The Constitution is No Bar

One of the central issues to any discussion of the administrative state is that of the "nondelegation doctrine."[31] This issue is key because critics of the administrative state find much of the force of their arguments in the assertion that Congress has unlawfully delegated its own powers to the executive branch

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26. *See supra* note 25.

27. Vermeule, *What Legitimacy Crisis?*, *supra* note 16; Farina, *Deconstructing Nondelegation*, *supra* note 25; *see also*, SUNSTEIN & VERMEULE, *supra* note 24, at 143 ("In contemporary government, federal and state agencies are arguably products of democratic will (acknowledging the role of self-interested private groups).").

28. *See supra* note 25.

29. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

30. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

31. Ballotpedia's coverage of The Administrative State, a useful introductory resource for those new to administrative law, identifies the "five pillars" of the administrative state: (1) nondelegation, (2) judicial deference, (3) executive control of agencies, (4) procedural rights, and (5) agency dynamics. BALLOTPEDIA, *The Administrative State Project*, *https://ballotpedia.org/The_Administrative_State_Project* (last visited Oct. 18, 2020). *See also* Vermeule, *What Legitimacy Crisis?*, *supra* note 16 ("Three concepts are indispensable to any discussion of a putative "legitimacy crisis" in the administrative state: delegation [being one]."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002). Put in more poetic, albeit skeptical, fashion: "If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case." Farina, *Deconstructing Nondelegation*, *supra* note 25, at 87.

agencies.[32] The scholarly body of literature on this doctrine is enormous and beyond the scope of this article. But given the doctrine's centrality to the discourse on the administrative state, a few words on the subject are necessary. In simplistic terms, the nondelegation doctrine—understood in constitutional and administrative law as an interpretation of the Article I vesting clause, which rests on a strong theoretical conception of the separation of powers—is this: Congress is clearly vested with legislative power by the People and, as such, may not delegate this prescribed authority to *other* governmental branches or entities.[33] With its locus in interpretive methodology and separation of powers analysis, defenders of the administrative state quite naturally take issue with the doctrine on these constitutionally derived grounds. There is, however, a faction of scholars from *both* sides of the administrative state debate who propose a shift away from such constitutionally based doctrinal analysis of nondelegation.[34]

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32. *See, e.g.*, William Turton, *How Our Administrative State Undermines the Constitution*, THE FEDERALIST (Feb. 8, 2019), https://thefederalist.com/2019/02/08/administrative-state-undermines-constitution/ ("Congress abandoned its legislative function and delegated its legislative powers to the unelected bureaucracy.").

33. U.S. CONST., art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]"); Whittington & Iuliano, *supra* note 20, at 388–90, 415; Mortenson & Bagley, *supra* note 20; HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 16 ; *see generally* Posner & Vermeule, *supra* note 20; BALLOTPEDIA, *Nondelegation Doctrine, https://ballotpedia.org/Nondelegation_doctrine* (last visited Oct. 20, 2020); *Nondelegation Doctrine*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/nondelegation_doctrine#:~:text=Overview,agencies%20or%20to%20private%20organizations (last visited Oct. 20, 2020).

34. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 378 ("[I]t is utterly misleading to frame the debate in terms of 'the nondelegation doctrine,' let alone its death."); Posner & Vermeule, *supra* note 20, at 1722 ("[T]here just is no constitutional nondelegation rule, nor has there ever been. The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory. Nondelegation is nothing more than a controversial theory[.]"); *see generally* Farina, *Deconstructing Nondelegation*, *supra* note 25. Professor Philip Hamburger, among the most prominent figures of modern administrative skepticism, proposes a departure from excessive focus on the nondelegation doctrine. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra*. The term "administrative skepticism" is Jeffrey Pajonowski's. *See* Jeffrey A. Pajonowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 869 (2020) (classifying views standing in opposition to the current mode of government as "administrative skepticism"). Because there is current academic gridlock on the question of nondelegation, Professor Hamburger suggests an approach that requires thinking in the precise terms presented in the Constitution's text and focuses discourse on the meaning of "vesting" rather than "delegation." *See generally*, Philip Hamburger, *Delegating or Divesting?*, 115 NORTHWESTERN L. REV. 88, 108 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1292&context=nulr_online. This makes sense given the latter term's conspicuous absence from the constitutional text. *Id.* But even some who stridently oppose Hamburger's broader view on the administrative state agree with him on this point. *See* Posner & Vermeule, *supra* note 20, at 1721–23; *see generally* Farina, *Deconstructing Nondelegation*, *supra* note 25. Professor Cynthia Farina, an academic of opposite persuasion with respect to the administrative state, suggests that confining discourse on the nondelegation doctrine to its purely constitutional framework is ultimately ineffective. Farina, *Deconstructing Nondelegation*, *supra* note 25, at 87–91. Instead, Professor Farina argues that nondelegation—itself a derivative of

This article follows that suggested path forward. Thus, any discussion of nondelegation in subsequent Parts refers to the *principle* of agency law rather than the traditionally stated constitutional *doctrine*.[35]

In tandem with his arguments that form the basis of the Approval Defense, Professor Vermeule makes two preliminary constitutional nondelegation doctrine arguments.[36] First, he argues that the nondelegation doctrine is a "legal fiction," meaning it is an interpretive theory with no valid basis in the Constitution's text or in historic constitutional law jurisprudence.[37] Second, Congress does not actually "delegate" legislative authority to administrative agencies in the first instance; rather, by creating federal agencies, Congress merely exerts its *own legislative* authority to statutorily empower agencies to exercise *executive* authority.[38] Thus, while agencies possess powers that *look* legislative in nature—e.g., rulemaking authority—Congress is not actually "delegating" any of its own vested powers.[39]

As noted above, a substantive response to Professor Vermeule's nondelegation arguments would require discussion of historic constitutional

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general agency law principles—should be analyzed from within that framework rather than its constitutionally-tethered form. Farina, *Deconstructing Nondelegation*, *supra* note 25, at 91–95 (analyzing nondelegation from purely agency law principles and concluding that challenges to the administrative state on these grounds are unjustified).

35. Use of the terms "nondelegation" or "delegation" will be used in connection with the principle, while any combination with the term "doctrine" will connote its well-defined constitutional heritage.

36. *See generally* Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

37. SUNSTEIN & VERMEULE, *supra* note 24, at 119–21 (arguing the nondelegation doctrine "lacks anything like secure constitutional roots"); Vermeule, *What Legitimacy Crisis?*, *supra* note 16; Posner & Vermeule, *supra* note 20, at 1722 ("[T]here just is no constitutional nondelegation rule, nor has there ever been. The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory."). Nor is Professor Vermeule alone in his view of the nondelegation issue. *See supra* note 20. But because the nondelegation issue is not central to the Approval Defense, as presented here, this article will only briefly address it and, again, leaves the substantive constitutionally-derived analysis of the administrative state's legitimacy to the legion of academic scholars who have been engaged in the debate for decades or longer. *See supra* notes 17–19. For more reading on the nondelegation doctrine and traditional constitutional arguments regarding the administrative state's legitimacy, the author suggests interested readers refer to those scholars identified in notes 20 and 22; *see also* Mortenson & Bagley, *supra* note 20, at 1 (refuting the claim that the nondelegation doctrine inheres in the Constitution); Whittington & Iuliano, *supra* note 20, at 380–81 (challenging the "narrative" that the nondelegation doctrine ever served as a valid check on Congressional delegations of power); Julian Davis Mortenson & Nicholas Bagley, *"The Nondelegation Doctrine is a Fable,"* THE ATLANTIC (May 26, 2020), https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/ (picking up on, in contemporary media, the recent scholarship that attacks the nondelegation doctrine).

38. Posner & Vermeule, *supra* note 20, at 1723 ("A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power. Conversely, agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.").

39. *Id.*

doctrine and both originalist and non-originalist interpretative methodologies and is therefore well beyond this article's limited scope.[40] At first glance, Professor Vermeule's claim that Congress is not actually delegating "legislative" power might strike one as pure semantic chicanery, which some have argued.[41] In any event, for purposes of this article it will have to suffice to note that his nondelegation arguments are highly contested.[42]

B. State and Public Approval as the Basis of Legitimacy

Nondelegation aside, Professor Vermeule puts forward his Approval Defense as grounds for the administrative state's legitimacy; namely, that—through the working together of all its coordinate branches—Congress, the Executive, and the Judiciary have approvingly endorsed this quasi-executive body since the beginning of the republic.[43] As he puts it: modern government was "created and limited by the sustained and bipartisan action of Congress and the President over

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40. For scholarly discussion on the legislative/non-legislative distinction and further analysis of what powers executive branch agencies actually exercise, interested readers might compare the writings of Professor Vermeule and Gary Lawson. *See generally* Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547 (2015); *see also* Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, AM. ENTERPRISE INST. (forthcoming 2021), https://ssrn.com/abstract=3607159.

41. *See supra* note 16; *see also* HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 17, at 378 ("The subdelegation problem thus arises primarily where Congress authorizes others to make legally binding rules, for this binding rulemaking, by its nature and by constitutional grant, is legislative."). Encapsulated, the objection is that, at its most basic, "legislative" power is the authority to make laws—"law" being the "solemn expression of legislative will" and a rule that commands human behavior. *Law*, BLACK'S LAW DICTIONARY ONLINE (2d ed). That administrative state advocates nominally consider such authority as executive, does not change the facts on the ground that agencies are writing their own rules of primary behavior that carry profound legal consequence for regulated parties. If this is true, administrative agencies are exercising *de facto* legislative power. That Congress confers on agencies this capacity to exercise legally binding edicts, by definition, suffices as a delegation of power that the People intended only Congress possess. *See* U.S. CONST. art. I, § 1. To the extent that advocates of the administrative state rely on the distinction between legislative and executive authority to deny the delegation issue, they overlook the reality that administrative agencies are doing precisely what Congress was authorized to do. Call it rulemaking, regulating, or "fill[ing] up the details," what are agencies doing but legislating by any other name? Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

42. *See supra* notes 16, 20.

43. Vermeule, *What Legitimacy Crisis?*, *supra* note 16. While this assertion may be factually correct—indeed, Congress has endorsed the administrative regime by virtue of its initial creation and continued channeling of authority into federal agencies—there is much debate about the chasm of dissimilarity between the form of executive administration at the founding and its current model, which raises questions of whether the *modern* form is legitimate based on a supposed heritage of Congressional approval. *See generally* EPSTEIN, DUBIOUS MORALITY, *supra* note 1, Part 2 (cataloguing the evolution of the administrative state from early American history, through the Constitutional revolution of 1936 Supreme Court term, to the present form); *Cf.* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (identifying administrative functions of the executive branch and related body of administrative law formulated since the earliest days of the republic).

time [and] blessed by an enduring bipartisan consensus on the Supreme Court. The classical Constitution of separated powers, cooperating in joint lawmaking across all three branches, *itself* gave rise to the administrative state."[44]

To support this claim, Vermeule notes that Congress has endorsed the administrative state by enacting the Administrative Procedure Act ("APA").[45] So too, bipartisan and independently elected Presidents evince the executive branch's approval "[b]y shaping and constraining the behavior of the administrative state" through appointment and removal, oversight, and political influence.[46] In fact, Vermeule argues, "presidents of both parties, including Ronald Reagan, have been enthusiastic promoters and protectors of the administrative state's major accomplishments[.]"[47] Third, the Supreme Court—on all but two occasions—has blessed the growth of the administrative state through non-enforcement and reformulation of the nondelegation doctrine over the decades, suggesting that no strict limitation on conferral of power to the executive branch was ever enforced.[48] The Court has also endorsed the APA as having "settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest," which Vermeule accepts as an endorsement of the administrative state itself.[49] To make these arguments, however, assumes that these branches are *capable*, independently or collectively, of conferring such legitimacy, a contestable proposition that will be discussed in subsequent sections.

In addition to State approval, Professor Vermeule argues that widespread public approval equally validates the administrative state.[50] In his view, that both political parties have nominated and elected and reelected candidates—like former President Barack Obama—who are "strong advocates of the administrative state" is adequate indicia of a "nation comfortable with technocratic governance."[51] This "deep, widespread, and sustained popular approval" is also apparently evinced in both political parties' "enthusiastic promot[ion] and protect[ion] of the administrative state's major accomplishments, including clean air, clean water, Social Security, and product safety."[52] There is no "widespread illegitimacy crisis" facing our modern form of government, the argument goes, because "the administrative state is pretty

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44. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

45. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

46. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

47. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

48. Posner & Vermeule, *supra* note 20, at 1722; Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

49. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950); *see* SUNSTEIN & VERMEULE, *supra* note 24, at 30.

50. Vermeule, *What Legitimacy Crisis?*, *supra* note 16; *see also* Farina, *Deconstructing Nondelegation*, *supra* note 25, at 101 (referencing without citing public opinion polls broadly in favor of a strong administrative state generally).

51. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

52. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

much what our republic wants."[53] What other genuine basis of legitimacy could there be, but that "almost everyone likes it?"[54] In short, popular approval is said to be the measure of legitimacy.[55] There are certainly rebuttals to this philosophical assertion. But leaving the philosophical query aside for purposes of this article, the argument fails, on one hand, because there is simply not enough evidence offered in support of this alleged fact of general public approval of the administrative state.[56] Even if the evidence *were* abundant, this article attempts to demonstrate why, based on agency law principles, the mere fact of tripartite support plus positive public opinion is *not* enough to confer legitimacy in our American system of government.

In sum, Professor Vermeule's approval arguments can be summarized as follows: notwithstanding the constitutionally suspect Congressional delegation of legislative authority to executive branch agencies, the State and the public have both offered post hoc endorsement of the administrative state, by which its legitimacy is established. Framed this way, the Approval Defense amounts to an argument of ratification—the basic principle that unauthorized actions taken by an otherwise valid agent may be retroactively validated by the one who possesses original authorization for such acts.[57] Given this agency law-derived argument, this article responds in similar terms and legal principles to analyze the Approval Defense and its theory of legitimacy by ratification.[58]

III. AGENCY LAW & THE AMERICAN SYSTEM OF GOVERNMENT

To frame the conversation, following is a set of basic agency law principles, definitions, and applications to the modern system of American government. At the end of this section, it should be clear that the legal concept of an agency relationship is well-suited to reflect and analyze the structure of our political system in general, and to discuss the Approval Defense in particular.

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53. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

54. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

55. Vermeule, *What Legitimacy Crisis?*, *supra* note 16. Professor Vermeule makes the point that public approval has substantial weight in the question of legitimacy because, as he puts it:

> [U]nless we are willing to subscribe to a strictly normative conception of legitimacy – which would have the odd consequence that the administrative state might be stamped 'illegitimate' even if almost everyone likes it – we will have to admit that deep, widespread and sustained popular approval of the administrative state contributes to legitimacy.

Id. And while Professor Vermeule's argument is logically compelling, in a system of government that upholds the *Constitution* as the ultimate law, the answer is: *yes*, a strictly normative conception of legitimacy—that defines legitimate as *in accordance with the rule of law*—is precisely what we must be willing to subscribe to.

56. *See supra* notes 52–57 and accompanying text.

57. *See infra* Part III.

58. Professor Cynthia A. Farina has done a similar exercise, applying common law agency principles to the issue of nondelegation specifically and concluded that, understood in these terms, the practical realities of modern administrative government does *not* offend traditional principles of delegation. *See* Farina, *Deconstructing Nondelegation*, *supra* note 25, at 89–95.

A. Principles & Application

1. Basics of the Agency Relationship: Parties & Purpose

To begin, a few necessary terms: (1) agency; (2) principal; and (3) agent. Agency is defined as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[59] Forming an agency relationship requires three elements: (1) the principal's *manifestation* that the agent will act on the principal's behalf and for its benefit; (2) *consent* by the agent act as such; and (3) a *mutual understanding* between the parties that the principal retains control of the relationship.[60] Succinctly, an agency relationship is a consensual framework within which two parties agree that the agent will act on behalf and in the interest of the principal.[61] In this arrangement, the agent is vested with authority to act on the principal's behalf and may affect the principal's rights and liabilities through the agent's conduct.[62] And as the one that confers authority and whose rights and obligations are to be effected, the principal ultimately retains the control to limit the scope of the agency relationship or to terminate it altogether.[63]

The agency relationship is not, however, necessarily limited exclusively to the two parties and may be expanded to include additional subagents.[64] A subagent is an appointee of the original agent and, through delegation of the agent's authority to the subagent, becomes similarly responsible to and capable of acting on the principal's behalf.[65] This subagency arrangement is only proper, though, where the principal has explicitly or implicitly conferred authority on the agent to appoint subagents.[66]

2. The People & the State as Principal & Agent

America's republican form of government was established on the foundational understanding that "*Governments are instituted among Men, deriving their just Powers from the Consent of the Governed*."[67] At its core, this concept recognizes that the People possess rights, including that of self-rule, that predate the institution itself and are thus, collectively, the "sovereign" capable

59. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

60. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (AM. L. INST. 1958).

61. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c, d (AM. L. INST. 2006).

62. § 1.01 cmt. c.

63. *Id.*

64. § 3.15 cmt. b.

65. § 3.15(1), (2) cmt. b. "The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency as stated in § 1.01." § 3.15(1).

66. *See* § 2.01 cmt. b; § 3.15(2), cmt. b.

67. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

of conferring power on others. Upon this understanding, the nation's founders created a tripartite system—consisting of legislative, executive, and judicial branches (collectively, "the State")—designed to limit and disaggregate governing power among the three distinctive bodies, each vested with a particular function.[68] In the political arrangement then, the People— while acting in their collective, sovereign capacity and not individually or in special interest minority groups—function as the principal, with the tripartite branches as the agents. Though some suggest this is too simplistic a view of our form of government, it is nonetheless an authentic description of the historic, traditional conception of the American system, which ultimately recognizes sovereignty as residing with the People.[69] And this conception makes it easy to frame the American system in agency law terms.

This democratic arrangement functionally creates an agency relationship by satisfying each requisite element—manifestation, consent, and mutual agreement. First, the People, those possessing inherent rights to self-governance, have *manifested*—by organizing and instituting the governmental system to promote security and protect their rights—their intent that the State will act on their behalf and for their benefit in specific, enumerated areas of governance.[70] Second, the State—by and through its own agents, elected officials who take oaths of office to uphold the constitutional agreement—has *consented* to act on the People's behalf.[71] Third, both parties share a *mutual understanding*—evidenced in the written agreement and the oaths taken to uphold it—that the People retain ultimate control of the relationship.[72] Under this formulation all parties have a clear place in the formulated agency relationship.

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68. *See* CATO INSTITUTE, *The American Founders*, https://www.cato.org/research/american-founders (last visited Nov. 8, 2021). *See also* USAGOV, *Branches of the U.S. Government*, https://www.usa.gov/branches-of-government (last visited Nov. 15, 2020) (noting the Legislative branch makes laws, the executive branch ensures their enforcement, while the Judicial branch interprets their constitutionality).

69. This conception of "We the People" as ultimate sovereigns was well-established at the founding. For example, see James Wilson's comments at the Pennsylvania ratifying convention. James Wilson, *Pennsylvania Ratifying Convention*, THE FOUNDERS' CONSTITUTION (McMaster, et al., eds., 1787), https://press-pubs.uchicago.edu/founders/documents/v1ch2s14.html ("[T]he truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people."). Certainly, there is substantial opposition to this theoretical conception of popular sovereignty, but that dispute over political theory is beyond the scope of this article. For purposes here, it is assumed that ultimate sovereignty lay with the People in their collective capacity before institution of government and that subsequent acts by individuals or groups does not rise to the level of sovereign action.

70. We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish this Constitution for the United States of America.* U.S. CONST. pmbl.

71. U.S. CONST. art. VI.

72. *See generally* U.S. CONST.; *see also* U.S. CONST., art. I, II, III (vesting clauses); U.S. CONST. art. VI (required oath of office).

The question then arises: what of the administrative state? Federal administrative agencies are considered a part of the executive branch with the purpose of supporting and carrying out the work of the President, who would be otherwise incapable of fulfilling his constitutional duties. Given that agencies are subordinate to the President, they would seem to function, theoretically at least, as subagents of the Executive.[73] This assertion is not as straightforward as it first appears, however, and is precisely what invites such fierce debate over the administrative state's legitimacy.[74] Because of limited space and for the sake of argument, this article accepts the general characterization of federal agencies as executive branch entities, and therefore classifies them as executive subagents. Problems that arise from this classification will be discussed below.

B. The Nature of the Relationship

1. Fiduciary Duties, Scope of the Agency Relationship & Contract

The bounds of the agency relationship are determined in part by fiduciary duties inherent to the relationship itself, which, among other things, require the agent to act in the principal's interest.[75] The scope of the agency relationship is vital because, where the agent exceeds its authority, that action is deemed invalid and not binding on the principal.[76] The parties can also specifically shape the

73. BALLOTPEDIA, *Administrative State*, *supra* note 2.

74. There is another historic debate within legal academia regarding the extent to which the Chief Executive of the United States, the President, actually possesses power to control the entire executive branch. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992). On one side, this debate, known as the "Unitary Executive" theory, has scholarly advocates who argue that the President is vested with *all* executive power, such that he has total control of the executive branch and that any conferral of discretionary authority in federal agencies is therefore unconstitutional. *Id.* On the other side, detractors of this theory argue that such a theory is a "convenient fiction" that arose in response to the decentralization of executive power into administrative agencies. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1841–42 (2010); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2073 (2009); *See also* Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html (suggesting that administrative agencies are actually not all that accountable to or controlled by the executive branch of which they are supposedly a part). If this opposition to the Unitary Executive theory is correct, then administrative agencies, if not to be deemed unconstitutional, must be accepted as subagents of the President.

75. The fiduciary nature of the relationship means that the agent is duty-bound "to act loyally for the principal's benefit in all matters connected with the agency relationship," and is thus limited to conduct that is in the principal's interest. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006). Agency relationship contract interpretation is governed by general rules of contract law. § 8.07. For a discussion of other duties between agent and principal, see §§ 8.01, et seq.

76. *See*, *e.g.*, First Tenn. Bank Nat'l Ass'n v. St. Paul Fire & Marine Ins., 501 F. App'x 255, 260 (4th Cir. 2012) ("The principal is liable for the actions of the agent committed within the scope of authority, but not for actions outside the scope of the agent's authority.").

scope of their relationship via contractual agreement.[77] Such contracts, though not controlling where the principal otherwise expressly or implicitly expands the agent's power, hold substantial weight in determining the scope of an agent's actual authority and are generally interpreted in such a way to effectuate the intent and desires of the principal.[78] Though it is not required for the formation of an agency relationship, parties very frequently rely on such contracts to delineate the scope and terms of their relationship given the implications that such an arrangement carries, particularly for the principal.[79]

2. The Constitution as Contract

In the American system, the Constitution is the contract through which the parties—the People and their governmental agents—have delineated the scope of their agency relationship. Professor Randy Barnett, sounding in contractual concepts, aptly defines the Constitution as "the law that governs those that govern us."[80] This constitutional contract prescribes the terms on which the principal delegates its right to self-rule and on which the government's existence depends, and it outlines the type of authority that is vested with each agent—with lawmaking powers in Congress, executive and enforcement powers in the President, and adjudicatory powers in the courts of law.[81] To fulfill its inherent fiduciary duty to the People, then, the State must "act in accordance with the express and implied terms" of the Constitution, and must act in a manner to secure the People's interest rather than its own. These contractual principles carry particular weight when it comes to the principle of delegation.

C. On Delegation

1. Common Law Principle of Delegation

The familiar maxim *delegata potestas non potest delagari* is a well-established concept in agency law meaning that a delegated authority cannot be further delegated.[82] The agency relationship exists via delegation of the

77. § 1.01 cmt. c, e, h; § 8.01, cmt. c.

78. *See* § 2.02 cmt. c. "If the principal has stated the agent's authority in a formal written instrument, *the formality of the statement itself* is relevant to, and often dispositive" in determining an agent's actual scope of authority. *Id.* (emphasis added).

79. *See* § 8.07 cmt. b.

80. Randy Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2588 (2014).

81. U.S. CONST., art. I, II & III.

82. Horst K. Ehmke, "*Delegata Potestas Non Potest Delegari*" *A Maxim of American Constitutional Law*, 47 Cornell L.R. 50, 50–51, 51 n.11 (1961). The verb "to delegate" is defined as: "to send or appoint (a person) as deputy or representative; to commit (powers, functions, etc.) to another as agent or deputy." *Delegate*, DICTIONARY.COM, https://www.dictionary.com/browse/delegate?s=t (last visited Jan. 15, 2021). *See also* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405–06 (1928) (noting the well-established pedigree of the doctrine in agency law and recognizing its even broader application in the constitutional context); RESTATEMENT

principal's own authority to the agent and the agent, possessing no inherent authority of his own, cannot subdelegate this authority unless expressly or implicitly permitted.[83] Thus, while the agent may be able to enlist help in pursuing the principal's goals, the agent cannot convey anything other than the authority than he actually possesses to subagents.[84] Here again, a contract clearly defining the scope of the agency relationship is helpful to delineate whether the agent has authority to appoint subagents without leaving opportunity for ambiguity on that point.

2. Delegation in the Modern Administrative State

When it comes to the administrative state, the delegation issue is hotly contested and tends to form the locus of the debate, but usually raises the *constitutional* nondelegation doctrine, which will not be addressed here. Instead, a basic application of the agency law *principle* of nondelegation to the plain contractual language of the Constitution—which designates particular kinds of authority to its distinct agents (Congress, the Executive, and Courts)—demonstrates that the agents, having been delegated their authority by the People, may not then subdelegate their authority elsewhere unless expressly authorized or implicitly required.

To this, some contend, Congress *is* implicitly authorized to subdelegate powers to federal agencies on the grounds that these agencies are necessary to assist the Executive in fulfilling its constitutional duties.[85] Alternatively, it is argued, the "Necessary and Proper Clause," provides the Congressional agent—if not express at least implicit—authority to subdelegate powers to administrative agencies.[86] There is inadequate room here to discuss the delegation issue in detail. However, as with the Approval Defense more broadly, a basic application of principles of contractual interpretation—

(SECOND) OF AGENCY § 18 (AM. L. INST. 1958). For our purposes above, however, "delegation" is used only as an agency principle and does not reference the constitutional doctrine.

83. § 18 cmt. d; *see* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. d (AM. L. INST. 2006); RESTATEMENT (FIRST) OF AGENCY §§ 79, 80 (AM. L. INST. 1933); Mill St. Church of Christ v. Hogan, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990) ("In examining whether implied authority exists, it is important to focus upon the agent's understanding of his authority. . . . The nature of the task or job may be another factor to consider. Implied authority may be necessary in order to implement the express authority.") (citing 3 Am. Jur. 2d, *Agency* § 75)).

84. RESTATEMENT (SECOND) OF AGENCY § 17 (AM. L. INST. 1958). This rule rests on the understanding that a conferral of power on the agent to act on the principal's behalf necessarily carries with it an inherent degree of discretion, and that such discretionary authority—expressly vested in the agent—may not be handed to someone other than the specific person to which the principal entrusted it. § 17 cmt. a, b, c.

85. *See* Farina, *Deconstructing Nondelegation*, *supra* note 25, at 92–93 ("broad grants of regulatory power to administrative agencies can be justified as ['necessary'] subdelegations" that are achieved through the constitutionally ordained political process and remain ever subject to control of the People).

86. *See id.*

derivative of agency law—help dissolve those challenges.[87] For purposes of this article and as addressed below,[88] it is assumed that here Congress has in fact delegated its authority to the executive branch agencies, an invalid action apart from the otherwise clear contractual language of the Constitution, thus requiring ratification if such conduct is to be remedied.

D. The Ratification Problem

1. The Principle of Ratification

That agents sometimes act outside the scope of their authority is an inevitable fact, but one that can be resolved through ratification, or approval of the agent's unlawful act by the principal.[89] As previously stated, where an agent acts without actual authority, the relevant conduct is deemed invalid.[90] Thus, whatever acts the agent undertook outside the scope of his authority are, with respect to the principal, essentially a nullity. But a principal may—in the event

87. To start, the Constitution can be fairly read as expressly delineating the People's intent to convey governing authority to three separate agents, with each possessing distinctive powers. Based on a plain reading of this explicit language, it is difficult to infer that the People intended the executive agent, by and through its subagents—administrative agencies that possess the authority to enact positive laws,—to *also* possess legislative powers. In certain contractual provisions, moreover, the People expressly authorized their agents to exercise those powers generally reserved to the other agents. For example, one clause gives Congress exclusive authority to conduct what appears very much like a form of adjudicative powers in specific circumstances. U.S. CONST., art. I, § 3 (giving the Senate the sole power to try impeachments). Applying basic principles of contractual interpretation, thus, strongly suggests that a principal who explicitly provides exceptions to its general provisions in one place, is certainly capable of creating such exceptions in other places if it intended to.

To the argument that the "Necessary and Proper" clause provides the allowable inference that agents are authorized to subdelegate their authority—and that Congress can thereby legitimately create administrative agencies—here, it is vital to pay particular attention to the *kind* of authority being delegated, because an agent that possesses only one kind of authority cannot delegate a *distinct* kind of authority to a subagent. *See supra* note 86 and accompanying text.

Accordingly, arguments of "delegation" that rely heavily on the distinction between legislative and executive authority necessarily fail under this basic principle of agency law. Farina, *Deconstructing Nondelegation*, *supra* note 25, at 99–100 (noting the existence of such nondelegation arguments).

Finally, one qualification is necessary. The arguments above are not to say that if agencies are exercising legislative authority in some form, that they must be illegitimated entirely. The agency relationship could certainly include appointments of executive subagents that exercise only the kind of authority that the Executive does—the power to execute the laws. Thus, to the extent that administrative agencies are simply making pragmatic decisions with respect to enforcement of the laws and not *enacting* them, they would be acting within the scope of their subagent authority. This is all simply to note that an application of the most basic agency law-derived principle of nondelegation disallows a "delegation" theory that can only survive by maintaining a strict legislative-executive authority distinction.

88. *See infra* Part III.D.ii.

89. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2006).

90. *See supra* notes 80 and 85 and accompanying text.

that the agent's unauthorized actions are desirable or beneficial—validate the otherwise invalid acts through "ratification."[91] Ratification is effectuated when the principal, with full capacity and knowledge of all material components of the agent's conduct, approves of the agent's transgression, giving full legal and retroactive effect to the unlawful act.[92] This process requires the principal's clear manifestation of his intent to approve the agent's unlawful act or otherwise obvious conduct that reasonably indicates his approval.[93] Moreover, ratification is generally an affirmative act, limiting a finding of ratification by silence to clear instances in which the agent is fully aware of the agent's unlawful act and continues to receive the benefits of the unlawful transaction without explicitly validating the agent's conduct.[94]

2. The Problem of the Administrative State

Given the basic rule that agents must act within the scope of their delegated authority, an acute problem arises when one recognizes that federal agencies—which we accept as executive branch subagents—have received *from* Congress, another agent, not just executive authority like investigative and prosecutorial power, but also rulemaking (quasi-legislative) and adjudicatory (quasi-judicial) powers.[95] In short, the People's agent, Congress, has essentially delegated some of its own authority, as well as some aspects of the other agents' authority, to the *Executive*'s subagent, creating a fourth quasi-agent possessing all forms of governmental power that the People originally intended to disaggregate among its agents—a clear violation of the basic principle of nondelegation outlined above.

Recognizing this fact, the only remedy for this illegitimate conduct is ratification by the principal. While there are, in the constitutional order, mechanisms to discipline and revoke authority from governmental agents by way of the political process (e.g., through the election process), a mechanism for *post hoc approval* of otherwise blatantly unconstitutional acts is lacking. The amendment provision of Article V of the Constitution, however, seems to provide the necessary remedial mechanism to validate this sort of unlawful agent conduct. A constitutional amendment—which requires the People to explicitly manifest their assent through a decisive act in their super-majority, sovereign capacity—would allow the principal to validate the agency relationship violation that the creation of a quasi-administrative agent effectuates. Thus, if the People so desired, they certainly *could* validate the administrative state through an affirmative grant of authority on this quasi-executive branch. And though

91. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2006).

92. *See* §§ 4.01(2)–(3), 4.02, 4.04(1) cmt. b, 4.06(1) cmt. b.

93. *See* § 4.01(2).

94. *See*, *e.g.*, Brooks v. Bell, No. C-970548, 1998 Ohio App. LEXIS 1476, at *16 n.18 (Apr. 10, 1998) (citing, in addition to several other jurisdictions, Reuschlein & Gregory, *The Law of Agency & Partnership* (2 Ed.1990) 77, Section 33).

95. *See* BALLOTPEDIA, *supra* note 2.

amendment is a notoriously arduous task it is not an impossible one. Indeed, the People have manifested their intent to modify their democratic agency relationship in this way on at least twenty-seven occasions over the course of American history.[96] In the absence of alternative processes that satisfy ratification's requirements like this process does, constitutional amendment seems to be ratification's only viable surrogate in the government-as-agency metaphor.

IV. THE APPROVAL DEFENSE: ANALYSIS AND CRITIQUE

Upon consideration of the forgoing principles, the Approval Defense—which argues for the administrative state's legitimacy based not on its fundamental constitutional validity but based on purported State and the People's retrospective "approval" of Congress's creation—is much akin to an argument of post hoc ratification.[97] In agency terms, if the administrative state is an unlawful act by the principal's government agent, ratification is the only possible remedy. Whether ratification has actually been achieved is this article's primary focus. Upon reviewing the Approval Defense's evidence of State and public approval, it is clear that the administrative state's ratification has yet to be demonstrated.

A. State Agents Cannot Properly Ratify Their Own Creation of the Administrative State

As noted in Part II.B, the evidence for State approval is that over time Congress, multiple Presidents, and the Supreme Court have, collectively and in bipartisan fashion, endorsed the continued existence of the administrative state. But this evidence fails to explain *why* such approval should be accepted as legitimate ratification within our established framework of government. The argument assumes that because neither Congress, any sole President, nor the Court has abolished the administrative state, they have ratified it. Mere participation in the tripartite system that created the administrative state—and possibly erred in doing so—does not necessarily demonstrate unquestioned approval of the regime, however.

A cursory historical survey demonstrates precisely the opposite of homogeneous approval, with Congressional minorities, Presidents, and Supreme Court Justices alike exhibiting strident—albeit insufficiently lethal—opposition to the administrative state's historically unhampered growth into its unwieldy current manifestation. The Administrative Procedure Act of 1946 was, itself, an attempt to *remedy* the all-too-apparent problems with the administrative regime.[98] Moreover, to assert that a President like Ronald Reagan, a notorious advocate of limited government, was supportive of the administrative state's

96. *See generally* U.S. CONST., amend. I–XXVII.

97. *See supra* Part II.B.

98. EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 3–4.

"major accomplishments" does not require the conclusion that such support equates unadulterated approval of the administrative state in its modern form.[99] Third, to say that the Supreme Court has given its judicial stamp of approval needs further expounding. The suggestion that the Court's continued constitutional trend of deference, which began in the 1960s New Deal-era, confers legitimacy ignores other judicial realities, such as stare decisis—including the desire to maintain the public's perception of the Court's legitimacy—the process of certiorari, and political gamesmanship's influence on the Court's jurisprudence.[100] So the evidence provided is not altogether convincing.

But even if one is convinced by this fairly scant evidence that these governmental agents have, in bipartisan fashion, expressed their approval of the modern administrative state, this conclusion does not resolve the greater question whether such approval *suffices* to confer legitimacy. Viewing the administrative state problem within the framework of agency law, it is clear that Congress, the Executive, and the Courts—agents in this context—cannot validate their *own* contested actions. If these three governmental co-agents have illegitimately acted beyond the scope of their authority by creating subagent administrative agencies in violation of the constitutional contract that details the proper scope of government, they cannot *themselves* rectify that error. The tripartite design itself, laid out in the Constitution, supports this argument. Within the system, each coordinate political branch is vested with limited and

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99. Hedrick Smith, *Reagan's Effort to Change Course of Government*, N.Y. TIMES (Oct. 23, 1984), https://www.nytimes.com/1984/10/23/us/reagan-s-effort-to-change-course-of-government.html; Vermeule, *What Legitimacy Crisis?*, *supra* note 16; *see also* Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State",* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html (noting President Donald Trump's extreme deregulatory agenda). In fact, some fierce critics of the administrative state laud its valuable achievements, and do not expressly advocate for its entire overthrow. *See*, *e.g.*, EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 3, 33. So, to suggest that recognizing the administrative state's beneficial accomplishments is equivalent to wholesale endorsement is inaccurate, at best.

100. EPSTEIN, DUBIOUS MORALITY, *supra* note 1, at 3–4; Planned Parenthood v. Casey, 505 U.S. 833, 865–68 (1992):

> ([T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and *perception* that shows itself in the *people's acceptance* of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.)

(emphasis added); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. REV. 389 (2004); Gabe Roth, *Supreme Court Term Limits Could Reduce Gamesmanship, Shouting*, BLOOMBERG LAW (Oct. 2, 2020, 4:01 AM), *https://news.bloomberglaw.com/us-law-week/supreme-court-term-limits-could-reduce-gamesmanship-shouting*; *see generally* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019 (2018) (reviewing RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017)).

enumerated powers. These siloed powers were designed such that each branch's "ambition . . . be made to counteract ambition" of the others, such that concerted political cooperation between the co-agent branches is necessarily difficult.[101] To assume that such distinctive powers can therefore be shared amongst the agents—such as lawmaking power existing in both Legislative and Executive branches—would defeat that express delegation to distinct agents. Thus, only the principal, the People, has capacity to ratify an action the agent took outside the agent's actual scope of authority. So, the mere fact that allegedly Congress, multiple Presidents, and the Supreme Court have, over the arc of American political history, created and "approved of" the growing administrative regime does nothing to remedy this breach of the contractually defined agency relationship. In sum, that the State has ratified the administrative state is an invalid argument because agents cannot ratify their own actions.

B. No Evidence the People Have Ratified the Administrative State

The follow-up response to the immediately preceeding argument is that the People *have* ratified the administrative state through the democratic process and any outstanding doubt about such democratic approval is quelled by observing the administrative state's general popular approval. As it has been stated, in Vermeule's view, to challenge "this long-sustained and judicially-approved joint action of Congress and the President" as an improper mechanism for conferring constitutional legitimacy on this governmental administrative creation is not a criticism of the administrative state, but a suggestion that the "whole constitutional order is intrinsically misguided."[102] Thus, the argument goes, to claim the People cannot validate the administrative state through the tripartite outworking of the democratically-created political system that itself *gave rise to* the regime is to suggest the entire enterprise is defunct. But there are multiple problems with this assertion.

One of the primary difficulties with the constitutional agency relationship is that the collective will of the People, after initial conferral of power on their political agents, ceases to act except *through* those designated actors. The Peoples' constitutional act of sovereignty initiates the agency relationship and authorizes the agents to act within their designated democratic spheres. But because the People can act as principal only in their collective, sovereign capacity, the principal is thereafter barred from interacting with its agents or modifying the scope of that relationship except by constitutional amendment—a manifestly arduous task.[103] By contrast, in a traditional agency relationship the principal can command the agent directly, modifying instructions and amending the scope of the agent's authority as circumstances change. In the

101. THE FEDERALIST NO. 51 (James Madison).

102. Vermeule, *What Legitimacy Crisis?*, *supra* note 16.

103. *See supra* notes 70–71 and accompanying text; *see* Jay Cost, *The Constitution is Very Hard to Amend* (Apr. 2, 2018, 6:30 AM), https://www.nationalreview.com/2018/04/united-states-constitution-difficult-to-amend/.

democratic process, this clear path of communication between principal and agent, except by amendment, simply does not exist. One could argue that the principal *does* in fact interact with and direct its agents through the representative process—through constituent correspondence, elections and recalls, and ballot initiatives, for example. But these forms of principal-to-agent communications, operating within the scope of the principal-agent framework as laid out in the Constitution, are better seen as correspondence, not between the principal in its sovereign capacity, but with non-principal individuals or groups of constituents who act to influence the agents in exercise of their discretionary authority. This assertion rests on the understanding that, after establishing government, individuals and small representative groups do not represent "the People" acting in their sovereign capacity. Thus, any *fundamental* change to the original agency relationship, however, must be made at the constitutional level.

Given this complexity, to claim that the People have validated their agents' unlawful conduct *by way of* the agents through whom the People must necessarily express their approval misunderstands the nature of the problem. Such a proposition is much like requiring a complainant, where there is no feasible alternative mechanism, to report his complaint *about* his supervisor *to* his supervisor because that is the general mode for reporting. Thus, to argue as I do here that ratification of the administrative state must come through amendment and not merely by democratic approval, is not a disavowal of the "whole constitutional order." It is simply a call for adherence to the only viable process of ratification—amendment—that is necessitated by such an obvious departure from the agency relationship's original framework as laid out in the constitutional contract.

Nor is the *lack* of a constitutional amendment evidence of the People's approval of an administrative state that violates its most basic contractual precepts—namely, disaggregation of agent authority. The Constitution implements this onerous, albeit surmountable, amendment barrier to massive structural change, intentionally making the process to alter the original shape of the democratic system painstakingly difficult. This fact alone supports the claim that following that process is the only valid method to ratify a modification to the original agency relationship that the administrative state produces. Moreover, perhaps the People's collective conscience has not yet fully awakened to their agents' unlawful conduct. And even if the People are aware of their agent's breach, given the amendment process's requirements, it could take decades for the People to muster the collective political will required to correct or ratify that transgression.

The problems with the Approval Defense's ratification-by-democratic-approval theory do not end there. It also overlooks the fact that our political system is often—in-part by design—unresponsive to anything short of a drastic convulsion of the public will. The expansive outgrowth of political interest groups with the express purpose of helping influence policy outcomes reflects

the reality that our representative system often struggles to effectively channel the public will.[104] Even if one accepts, for the sake of argument, that the democratic outworking of our tripartite political system *is* a sufficient means to channel the will of the People in their sovereign capacity and that the administrative state *can* be validated this way, such a proposition does not prove that the system has actually achieved this outcome. There still exists the plausible objection that the structure of our democratic political system is vulnerable to misuse and, for this reason, has either prevented the People's resolution of the question of administrative state or has provided a distorted answer to that question.

Public choice theory, and in particular Bruce Yandle's Bootleggers and Baptists theory—an economic tool that seeks to explain supply and demand in the social regulatory context—helps demonstrate how this is so.[105] In Yandle's theory, "Baptists" are the proponents of a certain policy whose political action derives from a sense of moral conviction.[106] "Bootleggers" are those who, "expect[ing] to profit from the very regulatory restrictions desired by Baptists, grease the political machinery with some of their expected proceeds," thus funding the desired policy outcomes in the same way an individual in the private sector makes short-term investments to achieve long-term dividends.[107] Applying Yandle's theory more broadly to the question of the modern administrative state, it is easy to identify several figurative Bootleggers and Baptists with plausible reasons, either economic or philosophical, to maintain the current regime and prevent the People from upending the governmental status quo even if they wished to. A few examples will have to suffice. The most obvious Bootleggers who stand to gain from the maintenance of the administrative state are the federal agencies themselves who have both

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104. *See* Wallach, *supra* note 16, at 3–4.

105. Bruce Yandle, Viewpoint: *Bootleggers and Baptists–The Education of a Regulatory Economist*, 7 REGULATION 12, 13–14 (1983):

> [T]his theory is not new. In a democratic society, economic forces will always play through the political mechanism in ways determined by the voting mechanism employed. Politicians need resources in order to get elected. Selected members of the public can gain resources through the political process, and highly organized groups can do that quite handily.

See also Bruce Yandle, *Bootleggers and Baptists in Retrospect*, 22 REGULATION 5, 5 (1999); William Dubinsky, *Law and Public Choice: A Critical Introduction*, 90 MICH. L. REV. 1512, 1512–1513 (1992) (reviewing DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) ("[P]ublic choice theory challenges the traditional assumption that government operates in the public interest. Instead, [it] views the policymaking process as a battlefield where legislators, bureaucrats, interest groups, and individual voters compete to maximize their own private interests."). Public choice helps explain how private interest group's economic incentives play a role in the public arena. For an insightful case study analyzing special interests' effect on the regulatory landscape of New York's taxi-cab industry, see generally Jeremy Kidd, J.D., Ph.D., *Who's Afraid of Uber*, 20 NEV. L.J. 581 (2020).

106. Yandle, *Bootleggers and Baptists in Retrospect*, *supra* note 107, at 5.

107. *Id.*

theoretically discernable and *verifiable* incentives to expand the scope of their authority, increase their budgets, and perpetuate their own existence.[108] The other obvious category of Bootleggers, among potential others, are the legislative representatives who stand to gain insulation from backlash over controversial political decisions that are more easily delegated to federal agencies.[109] The pro-administrativist Baptists are just as easily identified. Indeed, there are many political theorists, historic and contemporary, who laud the administrative state and advocate for its continuance on account of its benefits for the public welfare.[110]

In summary, there are multiple shortcomings to the ratification-by-public-approval argument, which is the Approval Defense's only viable theory when agency law principles are applied. To simply declare that the democratic process itself provides the means to validate the administrative state does not prove that it has, in fact, been validated through that process. And the evidence offered to compel the conclusion that it has is altogether lacking.[111] Thus, to alter the original tripartite constitutional framework, the People must change the agency contract by amendment. This is no easy task. It is not impossible, however, given that the People have done so on multiple occasions and in fairly recent history.[112] If the People wished to authorize the creation of the administrative state through ratification via the amendment process, they certainly could. Clearly, they have yet to do so. And until they do, the administrative state's question of legitimacy remains.

CONCLUSION

The administrative state's crisis of legitimacy is an enduring problem, despite the intense desire of many academics who wish to lay the issue to rest. For many Americans, the looming threat of an unwieldy, unaccountable, and ever-expanding regime of federal agencies with power to write, prosecute, and adjudicate their own rules elicits an uneasiness that will not be assuaged with

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108. *See generally Necessary & Proper Episode 45: Agency Rule-making: Unnecessary Delegation or Indispensable Assistance?*, THE FEDERALIST SOCIETY (July 18, 2019), https://fedsoc.org/commentary/podcasts/necessary-proper-episode-45-agency-rule-making-unnecessary-delegation-or-indispensable-assistance.

109. *Id.*

110. For example, Woodrow Wilson openly justified the administrative state on the grounds that the public interest is better entrusted to the elites. *See* Wilson, *supra* note 20, at 199–201, 209 ("The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes."). The Approval Defense's proponent lauds the administrative state on precisely these grounds. *See* Vermeule, *What Legitimacy Crisis?*, *supra* note 16 and accompanying text.

111. *See supra* notes 52–58 and accompanying text.

112. U.S. CONST., amend. XXVII (ratified in 1992); Steven G. Calabresi & Zephyr Teachout, *The Twenty-Seventh Amendment*, CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxvii/interps/165#:~:text=The%20Twenty%2DSeventh%20Amendment%20was%20accepted%20as%20a%20validly%20ratified,ever%20second%2Dguess%20that%20decision (last visited Jan. 15, 2021).

vague assurances that"the administrative state is pretty much what our republic wants."[113] But concerns about administrative power is not the exclusive reason for all the discord. The problem lies in the fact that no explanation for this monstrous growth of federal expansion has yet been satisfactory to the public who have, by their democratic acquiescence, allegedly validated its existence. If the People are expected to come to terms with the fact that they have already relinquished—by retrospective approval—their right to self-governance and placed it in the State's hands to dispense indeterminately amongst federal agencies, the fact of such ratification needs to be proven, not merely asserted. Until proponents of the Approval Defense can demonstrate convincingly that the People have unequivocally validated their agents' unlawful transgression, this fight over the administrative state's legitimacy will simply not go to its grave.

113. Vermeule, What Legitimacy Crisis?, *supra* note 16.