each senator to adjudicate for herself whether Rule 22 has in fact come to operate as an improper rule of decision rather than a proper rule of debate. And in adjudicating that question, the Senate, operating as a constitutional court of sorts, acts by majority rule, just as the Supreme Court itself does when adjudicating constitutional (and other) questions.

"This Constitution…shall be the supreme Law"

AMERICA DELIGHTS IN ITS INVENTIONS. From bifocals at the Founding to light bulbs, flying machines, and iPhones in the modem era, we constantly quest for the holy grail of the next new thing. America's lawyers over the centuries have proved especially inventive in devising new institutions and institutional devices to respond to perceived problems. As postbellum America's economy, society, and laws became increasingly complex, requiring more scientific expertise and bureaucratic rationality within government to regulate both private actors and the government itself, new "independent agencies" arose. And as legislators felt obliged to give more policymaking authority to administrators, Congress sought to reserve a checking role for itself via a newfangled contraption called the "legislative veto." In the wake of Watergate, a new breed of judicially appointed "independent counsels" emerged to keep all the president's men in line.

This much is well understood by lawyers and scholars of all stripes. What is not well understood is why certain modern institutional innovations have endured while others have imploded. A glance at four of the past century's most notable institutional innovations will suggest a startlingly simple answer: Innovations that utterly disregarded the written Constitution's blueprint ultimately proved structurally unsound and collapsed of their own weight. Innovative institutions carefully erected inside the flexible (but not infinitely flexible) lines of the blueprint remain standing.

CONSIDER FIRST THE *legislative veto*, a device that modern Congresses have insinuated, in some form or other, into hundreds of statutes. A legislative-veto clause purports to vest one or both houses of Congress, or some subset thereof (say, a House or Senate committee) with the legal authority to block—to "veto," in effect—certain attempted executive-branch imple-

mentations of the statute. Imagine a statute that says that all persons who meet conditions A, B, and C will be eligible for a certain benefit (say, a sizable rebate on their income taxes). A legislative-veto clause in this statute might say that whenever the executive branch decides that a person meets the statutory conditions and thus deserves the statutory benefit, either house (or some committee) may unilaterally nullify this decision.

This familiar device, in all its variants, is constitutionally preposterous—a flamboyant negation of the Constitution's basic structure. As advertised by its honest and oxymoronic label, the device improperly aims to vest quintessential executive (and/or judicial) powers in legislators. The written Constitution's rules and principles are clear. Congress's job is to enact general and prospective laws—to decide, in our example, whether to require A, B, and C, or D, E, and F instead. Once the law is on the books, it is for other branches, namely, the executive and the judiciary, to implement and interpret it. If Congress wishes to change the law, Congress must enact a new law, with both houses agreeing and the president assenting (or being duly overridden). Only in a few specific situations defined by text and tradition may Congress play executive or judge, or may a single house act unilaterally on outsiders—for example, in impeachments, in judging house elections, in conducting inquests, in disciplining its members, in imposing contempt punishments, and in controlling physical space in the Capitol. These are the proverbial exceptions that prove the rule that in other situations, Congress must stick to lawmaking and leave law execution and law adjudication to others.*

* Here are two formal proofs of the unconstitutionality of the legislative veto. Proof number 1: The federal government has only three kinds of power—legislative, executive, and judicial (per the Constitution's first three articles and Tenth Amendment). Hence the legislative veto must fit into one of these three boxes. If it is an exercise of legislative power, it requires bicameralism and presentment. If, conversely, it is an exercise of executive or judicial power, it may not be carried out by the Congress, which is not given such powers (outside a few carefully specified contexts). Either way, the legislative veto fails. QED. Proof number 2: In voting to block the executive's determination that conditions A, B, and C are met and that a given person thus deserves the statutorily prescribed benefit, Congress is doing one of two things—either applying the ABC standard specified in the earlier statute, or laying down a new standard. In the former case, this effort to apply a prior law to a later and specific fact situation is an impermissible effort to wield executive or judicial power. In the latter case, this effort to adopt a new legislative standard requires bicameralism and presentment. Either way, the legislative veto fails. QED.

Nothing in the Constitution's ratification debates or in early federal practice offers any support for a legislative veto, a statutory device that first appeared in federal statute books in 1932, nearly a century and a half after the ink had dried on the Constitution.[47]

When the legislative-veto issue finally reached the justices in a landmark 1983 case, *INS v. Chadha*, a broad coalition of jurists from across the spectrum laughed the device out of court. Only one justice, Byron White, voted to uphold the constitutionality of the device, and even he joined a later opinion that reaffirmed and extended *Chadha*'s basic teaching.[48]

How, then, are we to make sense of the fascinating fact that even after *Chadha*, Congress has continued to slip legislative-veto clauses into statutes? Two points are key. First, even as presidents both before and after *Chadha* have signed omnibus bills containing these dubious devices, America's chief executives have routinely attacked these clauses and at times publicly announced that they would treat attempted legislative vetoes as legal nullities. Unlike other innovations that have endured (such as independent agencies), the legislative veto never won the considered and consistent support of all the branches of government. In *Chadha* itself, the Court noted that "11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional." In the years since *Chadha*, America's presidents have continued this tradition of official opposition.[49]

Second, post-*Chadha* legislative-veto clauses may operate politically even if they do not create valid law that courts will respect or that presidents will routinely follow. Imagine, for example, an omnibus bill funding the federal judiciary that contains a clause purporting to give the senior senator from Nebraska the right to pick the next federal district judge from Nebraska. Legally, such a provision is preposterous and unenforceable, because the Constitution is clear: Presidents, not senators, select judges. Nevertheless, as politics actually play out, a president might choose to give Nebraska's senior senator de facto authority to call the shots on a judicial nomination from the senator's home state, perhaps in order to win the senator's support for other elements of the president's agenda. Although the official nomination would always come from the president himself, everyone

might know that it was the senior senator who unofficially made the selection. Thus, the hypothetical Nebraska clause, though *legally* invalid, might nevertheless work *politically*, memorializing an informal arrangement that this president (or a future president) may hesitate to dishonor even if the chief executive has an absolute constitutional right to do so. Post-*Chadha* legislative-veto clauses may similarly operate politically today even though they are, from a strictly legal point of view, obviously invalid.

CONSIDER NEXT THE POST-WATERGATE REGIME of *independent counsels*—an institution that ultimately led to the only impeachment of an elected president in American history.*

Ordinarily, federal criminal investigations and prosecutions occur within the Justice Department, headed by the attorney general, who serves at the pleasure of the president. But in the early 1970s, shocked Americans came to learn that several prominent members of the Nixon administration—including the president himself, several of his top White House aides, and his attorney general, John Mitchell—were themselves criminal wrongdoers. In situations such as this, could the Justice Department be trusted to properly investigate and prosecute?

Obviously not, thought many reformers. Thus, a 1978 statute and successor legislation authorized a special panel of Article III judges to appoint a lawyer independent of the Justice Department to make the key investigatory and prosecutorial decisions in certain specified situations where the department was arguably untrustworthy. Between 1978 and 2000, judicial panels appointed at least eighteen independent counsels in low- and high-profile cases alike—most famously, Ken Starr, who was tapped to investigate possible wrongdoing by officials in the Clinton administration, including the president himself. At the end of the millennium, Counsel Starr's ever-widening investigation provided the basis for Clinton's impeachment by the House. The Senate ultimately acquitted.[50]

Despite its good intentions, the 1978-style independent-counsel regime violated the Constitution's plain meaning and warped the document's ba-

* Recall that Andrew Johnson was never elected president in his own right and became president only by dint of an assassin's bullet.

sic structure. This poorly designed system ultimately imploded, and this implosion in turn occurred precisely because of the 1978 statute's failure to mesh with the carefully calibrated institutional gears created by the written Constitution.

True, the Constitution's text allows Congress by law to empower courts to make certain appointments—but only of "inferior" officers. Independent counsels were not truly inferior. How, indeed, can one be both truly independent and truly inferior? Like the legislative-veto device, the independent-counsel regime wore its unconstitutionality on its sleeve.

Elsewhere in the Constitution, whenever the word "inferior" appeared, it conjured up a *relational* idea. Each inferior had a superior. Thus the document described lower federal courts as "inferior to" the Supreme Court, which would in turn be supreme over the inferior courts (and not, as some might think, over the other branches or over the Constitution itself). Analogously, the plain purpose of the inferior-officer-appointment clause was to allow a court, pursuant to statute, to appoint officers inferior to the appointing court, such as law clerks or special-purpose magistrates.

This plain purpose was confirmed and clarified early on, when Congress and President Washington implemented the appointments clause's companion language allowing an executive department head/principal officer to name an "inferior" officer whenever federal law so provided. In the ensemble of statutes enacted as part of the Decision of 1789, Congress first authorized the secretary of foreign affairs (soon renamed the secretary of state) to appoint an "inferior officer" who would serve as the "chief Clerk in the Department," and thereafter authorized the three other department heads (the war secretary, the treasury secretary, and the postmaster general) to appoint similar assistants within their respective departments. The obvious principle put into practice here was that statutes could allow each appointing authority to pick its own assistants.[51]

Judicial appointments of prosecutors under the 1978 system shattered this Founding-era principle and precedent, for the simple reason that federal prosecutors are not now and never have been proper judicial assistants. On the contrary, prosecutors wield quintessentially executive power—prosecutorial power. Allowing judges to pick prosecutors was almost as outlandish as authorizing them to appoint admirals or ambassadors.[52]

Read at face value, the appointments clause preserved political accountability. If an inferior goofed, the public could blame the superior who appointed him, and who was responsible for monitoring his conduct. But the 1978 law blurred accountability. Once picked, an independent counsel effectively answered to no one. Had the judicial panel that appointed a particular independent counsel genuinely tried to supervise his actions as his investigation and prosecutorial decision-making proceeded, the judges would have thereby transformed themselves into super-prosecutors, in obvious violation of basic precepts of separation of powers.

Further compounding the constitutional perversity of the 1978 system, judges making these decidedly unjudicial appointments decisions operated wholly outside the traditional framework governing ordinary judicial decision-making. When adjudicating "cases" and "controversies," judges are ordinarily expected to explain their rulings via written opinions (or some other public statement of reasons), to deploy the tools of legal analysis in rendering their decisions, and to sharply limit their off-the-record ex parte communications with interested government officials. But picking prosecutors turned this regime topsy-turvy. Deciding which of the countless lawyers in America should be chosen above all others to serve as an independent counsel was essentially a political act, not a legal one. This decision called for a suitably political selection process in which judges, acting as an appointments panel, needed to, and presumably did, confer confidentially with top politicos to decide which candidates had the most political and prosecutorial credibility. (Shortly before naming Ken Starr as the special counsel to investigate Bill and Hillary Clinton, the head of the three-judge panel, Judge David Sentelle, lunched privately with two prominent critics of the Clintons, Republican senators Lauch Faircloth and Jesse Helms.)[53]

Some of the constitutional defects of the 1978 law were curable, perhaps, via aggressive use of the president's pardon pen. A counsel might in some sense be inferior (albeit not to the panel that appointed him) if the president himself kept the counsel in line. A president could ordinarily do so by pardoning the target of an independent counsel's investigation if the counsel ever went too far by spending too much time and money chasing trivial misconduct that did not merit Javert-style justice. Some post-1978 presidents did in fact use their pardon power—most notably, President George H.W. Bush, who pardoned former cabinet officer Caspar Wein-

berger before trial and thereby obliged the independent counsel in the case, Lawrence Walsh, to fold his tent.

As this episode illustrated, no person could ever be prosecuted by the independent counsel or by anyone else so long as the president strongly objected and was willing to act on that objection. The 1978 statute promised something that it could never really deliver. So long as the pardon power meant what it said—and nothing in the 1978 regime took direct aim at the pardon power—no prosecution could be legally independent of the chief executive.

With one notable exception: A president could never properly pardon himself. Such gross self-dealing was obviously unconstitutional, akin to a man sitting in judgment of his own case. Thus, uniquely among independent counsels, Ken Starr could not be controlled via the actual or threatened use of the presidential pardon pen, because Starr's investigation focused in part on the possibly criminal conduct of the president himself. Starr correctly recognized that he could not properly initiate an ordinary criminal prosecution against a sitting president. But this self-restraint hardly meant that Starr was a truly "inferior" officer.

Although the Supreme Court in the 1988 case of *Morrison v. Olson* initially winked at the constitutional flaws of the 1978 statute, Justice Antonin Scalia penned a powerful dissent that has come to prevail in both political and legal circles. Politically, no American president either before or after *Morrison* was ever willing to agree to the 1978 regime except as a temporary statutory experiment that would require periodic reassessment and reenactment. In 1992, the experiment lapsed when the first President Bush successfully opposed reenactment; but his successor, Bill Clinton, unwisely agreed to give the statute another run in 1994. Several years and several independent counsels later, the Clinton administration came to its senses. In testimony before Congress signaling that any additional attempt to reenact the law would meet a constitutionally based presidential veto, Attorney General Janet Reno repeatedly invoked Scalia's dissent. She concluded that the Independent Counsel Act was "structurally flawed, and… these flaws cannot be corrected within our constitutional framework." No veto proved necessary; Congress allowed the law to lapse in 1999, and no president or congressional leader since then has shown much interest in reviving this failed experiment.[54]

Legally, the Supreme Court has all but overruled *Morrison*, treating it as a dubious decision strictly limited to its unique facts. According to one of the Court's most recent pronouncements on the appointments clause, *Edmond v. United States*, "the term 'inferior officer' connotes a relationship with some higher ranking officer." As a rule, "whether one is an 'inferior' officer depends on whether he has a superior." This test and much of the other language of *Edmond* came directly from Justice Scalia's *Morrison* dissent, and Scalia himself was indeed the author of the *Edmond* majority opinion. None of the justices from the *Morrison* majority remains on the Court today.

The collapse of the 1978 experiment does not mean that America in the twenty-first century must do wholly without independent counsels, and must simply trust the Justice Department and the president to do the right thing out of the goodness of their hearts. Rather, the demise of the 1978 statute has simply restored the *political* system of independent counsels that had worked beautifully in Watergate itself.

Under that system, whenever doubt arose about the propriety of a Justice Department investigation of one of its own officials or some other sensitive target, political and professional pressure would build until the attorney general or the president himself named a special prosecutor outside the department and informally promised that prosecutor some zone of autonomy. If no such person was named, or if the zone of autonomy was unduly constricted, Congress could use or threaten to use its own vast powers of inquest and impeachment to prod the executive branch into action. If the special prosecutor, once appointed, went too far too fast, she could be legally dismissed by the superior officer who had appointed her (either the AG or the president himself); but if dismissal occurred for some seemingly corrupt reason, it would generate a political backlash. Politics kept the system in balance via the interplay of vigorous press oversight, congressional powers of inquest and impeachment, and executive powers of appointment, removal, supervision, and pardon. The game's ultimate umpires were not some tiny clump of judges meeting secretly, but the American people themselves in the press and at the ballot box.

Under this system, Richard Nixon's administration was obliged to hire a renowned Harvard law professor, Archibald Cox, to conduct a credible outside investigation of alleged administration wrongdoing. When Cox

pushed very hard very fast, Nixon had Cox fired, in the so-called Saturday Night Massacre. But Nixon paid an enormous political price and was politically obliged to replace Cox with another respected outsider, Leon Jaworski, who completed the job and indeed brought down the administration. Had Nixon tried to fire Jaworski or to pardon the targets of investigation in an effort to oblige Jaworski to close up shop, Nixon would have been quickly impeached and removed from office in exactly the way that the framers sketched the system on the drawing board, with Congress—not a judicial panel—making the key decisions.

Although this Watergate system of political independence offered less formal legal independence than the 1978 statute that arose to replace it, it actually worked better, and did so precisely because it did not stretch the roles and rules laid down in the terse text. Viewed from one angle, Archibald Cox and Ken Starr were almost identical twins. Cox was a well-respected Democrat who had served as a distinguished solicitor general to the man who had run against Nixon—John F. Kennedy. Starr, in turn, was a well-respected Republican who had served as a distinguished solicitor general to the man who had run against Clinton—George H.W. Bush. Starr's appointment was thus perfect poetic justice. Why, then, was Clinton much more successful in discrediting Starr than Nixon had been in his attempt to demonize Cox?*

One big reason was that Starr started off with less credibility than Cox precisely because Clinton himself had not picked Starr. In addition, Starr's appointment had arguably involved judges doing nonjudicial things in nonjudicial fashion. (Recall, for example, the controversial lunch between Judge Sentelle and leading anti-Clinton senators.) Had Clinton, like Nixon, been politically obliged to name an outside lawyer such as Starr, the outside lawyer would have had special political authority from the start, having been chosen not by a clump of mostly Republican-appointed judges, but by the Democrat president himself. After completing his service as independent counsel, Starr echoed Scalia and Reno in criticizing the basic structure of the 1978 act.

The complete collapse of the statutory independent counsel system

* Full disclosure: Ken Starr has been my friend for many years, and we regularly taught classes together at Pepperdine Law School from 2005 to 2010. However, I have never discussed with him anything closely connected to his service as independent counsel.

should teach us that modern reformers ignore the written Constitution at their peril. Innovations that work within or work around the document's formal rules survive. Innovations that run roughshod over these rules do not. A Watergate-style system of special prosecutors has worked before and can work again precisely because nothing in this political improvisation violates the Constitution's text—or, more precisely, because this improvisation nicely meshes with the written document's schema of institutions and incentives. By contrast, the 1978 system of legally independent counsels failed precisely because it dishonored the proper written roles of each of the three branches by placing too little reliance on congressional oversight and impeachment; putting too much confidence in judges, even as it obliged them to do nonjudicial things; and paying no heed to how presidents may usually control prosecutors via the pardon pen.

HAVING JUST SEEN A COUPLE OF FAILED twentieth-century institutional improvisations, let's conclude with a couple of modern success stories.

One clever, albeit highly technical, separation-of-powers gadget is known to beltway insiders as the *Saxbe fix*. Here's how it works: Under Article I, section 6, "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States…the Emoluments whereof shall have been encreased during such time." The obvious aim of this anticorruption provision is to prevent members of Congress from improperly inflating the salaries of executive or judicial offices and then benefiting personally by resigning from Congress and being appointed to those overpaid offices. The strict letter of the rule could be read to disqualify any member of Congress from any executive or judicial office for which the salary was increased during the member's current term. But the spirit of the clause is satisfied by a more sensible, if less literalistic, approach—the Saxbe fix—that allows the appointment so long as the appointee receives only the old (pre-increase) salary and thus does not pocket any salary increase that may have been recently adopted.

For example, if the salary for a given cabinet office swells from $100,000 to $105,000 on a senator's watch, and the president thereafter wants to appoint that senator to this office, a literalist might say the appointment would be irremediably illegal (since the salary was indeed upped on the

senator's watch). But under the less literalistic Saxbe-fix approach, the appointment would be proper so long as the salary is reduced—"Saxbe fixed"—back to $100,000 before the senator takes office.[55]

While the letter and the spirit of the emoluments clause arguably tug in opposite directions on this nice question, actual practice—approved by all three branches and both major political parties over a long stretch of time—sensibly breaks this interpretational tie. No justice ever refused to sit alongside ex-senator Hugo Black, who would have been ineligible for appointment to the Court under a hyper-literalist reading. Also, for more than a century, presidents and senators of both parties have continued to appoint and confirm resigned or resigning members of Congress to cabinet positions for which salaries had recently been increased, so long as the new appointee would not receive the increase. Indeed, outgoing presidents have repeatedly signed on to statutory "Saxbe fixes" aimed at accommodating the cabinet preferences of incoming presidents—even presidents of the other party. Cabinet members appointed under this approach include Treasury Secretary Lot Morrill in the Grant administration, Secretary of State Philander Knox in the Taft administration, Attorney General William Saxbe in the Nixon administration (whence the phrase, "Saxbe fix"), Secretary of State Edmund Muskie in the Carter administration, Treasury Secretary Lloyd Bentsen in the Clinton administration, and Secretary of State Hillary Clinton and Interior Secretary Ken Salazar in the Obama administration.

On reflection, the general acceptance of the Saxbe fix makes perfect sense precisely because this particular institutional improvisation rests on a plausible—albeit not incontestable—reading of the terse text. To see this clearly, let's imagine a hypothetical Senator Smith elected to serve a six-year term beginning at Time T_1. Early in his term (at Time T_2), Congress increases the attorney general's salary from $100,000 to $105,000. (It matters not whether Smith voted for or against this increase—the relevant constitutional rule in no way hinges on this fact.) Still later (at Time T_3), the president makes clear that he would like to name Smith as the next attorney general. Congress then (at Time T_4) passes a "Saxbe-fix" statute restoring the AG salary to $100,000. (It matters not how Smith votes on this, or, indeed, whether he is still in the Senate or has already resigned in anticipation of his executive service.) The Senate then confirms Smith at

Time T5, and Smith, after resigning from the Senate (if he has not already done so), assumes his $100,000 office at Time T6. A replacement senator, Jones, is named to fill out the remainder of Smith's Senate term, which ends exactly six years after T1. Call this end date T7. Did Smith's appointment violate the emoluments clause?

Recall the relevant words: "No Senator…shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States…the Emoluments whereof shall have been encreased during such time." A hyper-literalist might say that Smith's appointment was indeed unconstitutional. The AG's "emoluments" (i.e., salary) were indeed "encreased" at T2—and the fact that these emoluments were later decreased at T4 cannot change what did in fact occur at T2. And the $5,000 increase did occur on Smith's watch—"during the Time for which [Smith] was elected." The obvious counterargument is that the AG's salary really had not "encreased" *on balance* and *for Smith* between T1 and T6—a characterization that captures the two legally relevant moments in time and properly focuses on the "Senator" himself in keeping with the letter and logic of the clause. The salary was $100,000 both when Smith started his Senate term (T1) and when he entered office (T6). This is a perfectly sensible way to understand the word "encreased,"—especially once we understand the need to read the Constitution not literally but faithfully.

Even if we did not have the benefit of Chapter 1's extended case study of vice-presidential impeachment, the emoluments clause itself makes clear that constitutional words must be read sensitively and in context, with reference to their obvious spirit and purpose. First, what does the opening phrase "during the Time for which he was elected" mean? Suppose at Time T1 Smith is beginning his *second* term, and that he was in fact first elected to serve a term beginning six years before T1. If the AG's salary had been increased in that *first* term—from, say, $96,000 to $100,000—why couldn't it be said that Smith was ineligible to be appointed even during the interval between T1 and T2? True, before T2, Congress had not "encreased" the AG's "emoluments" during Smith's *second* term. But these "emoluments" had increased "during the Time for which [Smith] was elected," if that phrase is read in a literalistic, flatfooted way. The clause is not sensibly read that way, however, because this reading does not make good common sense or structural sense and because the clause can be construed more sensibly.

(The reason why this flatfooted reading makes no sense is that it would disqualify Smith between T1 and T2, but in this very same time period it would not disqualify ex-senator Smythe, who served alongside Smith in Smith's first term, and who then left the Senate at T1. What sense does it make to treat Smith worse than Smythe? Indeed, Smythe may have voted for the $4,000 increase, whereas Smith may have voted against it. And before T2, nothing in Smith's second term has happened in Congress that seems relevant to the emoluments clause.)

Now consider the emolument clause's final phrase: "during such time." During what time? Under a literal reading, "such time" obviously refers to earlier language, namely, "during the Time for which [Smith] was elected." In Smith's case, this first "during" phrase clearly covers the precise six-year period between T1 and T7. But upon reflection, it cannot be right that the final "during" phrase means the same thing as the opening "during" phrase. Suppose Congress had never raised the AG's salary at Time T2 in Smith's second term. If so, there would have been no problem whatsoever with his appointment at T6—and no need for any sort of Saxbe fix at Time T4. But what if Congress *later* increases the AG's salary on Jones's watch—that is, sometime after T6 but before T7? Surely this increase does not somehow retroactively oust Smith from office. Even though the first "during" phrase covers the entire period from T1 to T7, the second phrase only covers the period until Smith's appointment—T1 to T6. The closing phrase "during such time" cannot sensibly be read to mean the same thing as the opening phrase "during the Time for which [Smith] was elected," even though this might at first seem to be the literal meaning.

Just as other phrases in the emoluments clause—the opening "during" phrase and the closing "during" phrase—must be read with reference to their purpose and spirit, so, too, must the word "encreased" be construed functionally. The Saxbe fix is thus a highly plausible gloss on a genuinely ambiguous text—a classic illustration of how America's written and unwritten Constitutions generally cohere.

CONSIDER, FINALLY, THE ROLE OF various *independent agencies* that have been created over the past century, such as the Federal Trade Commission, the National Labor Relations Board, the Federal Reserve Board, and the Consumer Products Safety Commission. All told, several dozen

such agencies currently exist, making up a substantial portion of the federal government's regulatory apparatus. Many casual observers and even some scholars who should know better have suggested that the very existence of these agencies proves that real institutional practice in America broke free from the written Constitution long ago, and remains as free as ever today. A close look at both the text and the practice suggests otherwise.

The very label "independent agency" can be read in different ways, and some readings lead only to confusion. "Independent" agencies are of course not independent of the Constitution itself. Nor are they independent of the document's tripartite scheme. Constitutionally speaking, they are executive-branch agencies of a certain sort.

True, some of these agencies perform multiple functions—promulgating rules of conduct (as does a legislature), enforcing civil laws and prosecuting violations of criminal statutes (in classic executive fashion), and also performing adjudicatory tasks between government and individuals and sometimes even between private parties (much like a court). But this fact does not suffice to relegate these agencies to some counter-constitutional "fourth branch" outside the written Constitution's three-branch structure. Rather, this mixture of functions places "independent agencies" squarely within the second branch—the executive branch, a branch that has always performed a wide range of tasks. Interstitial rule-making within the bounds of a vague or ambiguous statute is a common executive function, as is applying law in the first instance to specific facts involving specific persons.

The label of independence may also mislead some into thinking that actual agencies either freely float between the Congress and the president or can be statutorily sited anywhere along the continuum between legislature and executive. In fact, these agencies conform to a strict pattern.

Note first how agency officials are *appointed*. The top members of so-called independent agencies are never directly named by Congress or by any subpart thereof. Rather, these officials are invariably appointed by the president, with Senate confirmation, in precisely the manner prescribed by Article II for all high-level executive-department officers. The point is not that Congress has never attempted to overleap these constitutional walls. It has indeed tried—and dramatically failed. For example, in 1974 Congress enacted an intricate federal campaign-finance law and created

a Federal Election Commission, which was vested with the classic executive functions of enforcing the statute and filling in statutory gaps via the promulgation of legally binding rules and regulations. These are precisely the sort of tasks that may be given to executive officers under Article II, yet under the terms of the statute, none of the six voting members of the commission were to be appointed in the constitutionally correct way. Rather, the statute said that two members were to be formally named by a *Senate leader*, two others by *the speaker of the House*, and the final two by the president—with all six members to be confirmed by *both* houses of Congress. When the statute reached the Court, the justices disagreed about several knotty campaign-finance issues raised by the law, but were united in striking down these outlandish appointments rules, which were quickly corrected by new legislation.[56]

Note next how independent-agency officials may be *removed*. Nothing in the written Constitution allows both houses of Congress, acting together without the president, or either house acting alone, or any subset of either house, to remove any executive officer—except, of course, via the impeachment process. Ordinarily, Congress must act by law—via bicameralism and presentment. In perfect harmony with this basic structure, independent-agency officers have never been removable by the legislature alone or by any subpart. Nor has the Senate succeeded in reserving to itself a role alongside the president in making removal decisions. Though the written Constitution might arguably be read to require the Senate to say yes to every ordinary removal, just as the Senate must say yes to every ordinary appointment, this reading was repudiated by the Decision of 1789. Whatever power exists to remove executive officers—including officers of independent agencies—is solely executive power. Nearly all of actual American practice from Washington's era to our own has honored this vision.[57]

In sum, so-called independent agencies are in reality executive agencies. These entities wield executive power. Their high-ranking officials are all appointed by the chief executive in much the same way that various cabinet heads are appointed—a process that ordinarily involves the Senate as well. The top officials of these agencies are removable by the president acting without any legislative involvement, in much the same way that various cabinet heads are removable.[58]

One key difference, however, is that cabinet heads are removable *at will*, whereas independent-agency officials are removable only *for cause*, and are in this sense more independent of the president. This modest form of independence is easy to justify precisely because it does not contravene the written Constitution, which, as we have seen, says nothing explicit about removal (outside of impeachment). Nor does this modest form of independence contravene the Decision of 1789, which only addressed departments akin to the State Department, the War Department, and the Treasury Department—departments with single-heads.[59]

True, we could read the Constitution to imply that all top executive officials must be removable at will. We could further read the document to imply that wherever a statute creates any executive-branch discretion or decisional authority, the president may always substitute his own personal discretion or decision for that of any high-level executive official—even when the statute explicitly vests the discretion or decisional authority in the official and not the president. But this is not a required reading of the text, which qualifies its grant of "executive Power" to the president in a variety of ways. A later clause in the Executive Article says that the president "shall take care that the laws be faithfully executed." This clause does not say that the president shall *personally* execute all the laws. It says that he shall oversee others and take care that the laws "*be* faithfully executed"—by others, who may indeed be vested by necessary and proper congressional statutes with certain discretion or decisional authority in domains where these independent officials possess distinctive expertise or impartiality.[60]

Or so the terse text may plausibly be read. And so government has operated for decades and perhaps centuries. And so the boundaries of presidential power have come to be accepted by a long line of presidents of both parties and all political stripes. And so the text and the practice have actually come to cohere and mutually reinforce.[61]*

Although a president may not dismiss an independent officer at will, he may dismiss any "independent" official who is not faithfully executing the law—anyone who is corrupt, careless, lazy, or lawless, for example.

* Even if the line between cabinet departments and independent agencies was not clearly established in constitutional text prior to 1967, the Twenty-fifth Amendment, which was adopted in that year, constitutionalized this line and thus implicitly endorsed the propriety of independent agencies. For details, see n. 61.

A president may also dismiss an independent official who is insubordinate to the proper role of the president as the superintendent-in-chief of the entire administration and the wielder of a broad set of powers that the Constitution itself vests in the president personally. For example, if a president orders an "independent" prosecutor not to pursue a certain target of investigation, and the prosecutor defies this order, the president could ordinarily nullify the prosecutor's actions by pardoning the target. Given this greater power of pardon, it would seem sensible that a president also has a lesser power of mere non-prosecution. And if, in fact, the president does rightly enjoy a power of non-prosecution—a power vested in him and him alone by the Executive Article itself in a specific clause beyond its opening "executive Power" grant—then any "independent" prosecutor who thumbed his nose at a presidential order to cease prosecution would have overstepped his subordinate authority and committed a removal-worthy act of insubordination. (If the official cannot in good conscience carry out the president's orders, the path of honor is generally not defiance but resignation.)[62]

The casual labels distinguishing cabinet officers from "independent" agency officials should thus not obscure the fact that both sets of officials fall wholly within the executive branch, albeit with varying rules of composition, authority, and removal.

Viewed through the prism of practice, the Constitution allows independent agencies to be created when three factors converge: first, when an executive entity is best headed up by a committee rather than by a single officer; second, when it makes sense to create continuity-enhancing fixed-tenure offices embodying technical expertise or nonpartisanship in a specific policy domain; and third, when an executive agency does not routinely interfere with specific constitutional grants of personal presidential authority, such as the powers to command the military, to personally monitor all cabinet heads, to pardon criminals, to parley with foreign leaders, to make appointments, to define an overall national agenda, and, more generally, to superintend the entire executive branch.[63]

Although the powers vested in independent agencies and the limited removability of these agency officials do constrain presidents, virtually all modern presidents have accepted these constraints. By contrast, many

presidents have loudly objected to improvisations such as the legislative veto or the 1978-style independent counsel. Those improvisations weakened presidents vis-à-vis Congress and courts, whereas limitations on the removal of independent-agency officials have merely reshuffled power among presidents over time. Although President A may not remove at will all the officials he inherits on his first day in office, his successor, President B, will likewise be unable to remove at will all the officials that A manages to appoint during his tenure. Each president thus gets his fair share of presidential power, albeit with a time lag. Put a different way, independent agencies do not involve any legislative vetoes in removals; nor do they give judges nonjudicial power to appoint executive officials. Unlike legislative vetoes or the 1978 independent-counsel statute, laws establishing independent agencies do not vest members of other branches with any executive power whatsoever. Rather, these laws, in keeping with the necessary-and-proper clause, merely allocate authority within the executive branch between the president and his subordinates.

Many presidents over the years may not have even wanted truly plenary power to remove and/or countermand all executive officials. The responsibility to review on a clean slate each policy decision made by every underling might well have weakened modern presidents by overloading them, making it harder for them to concentrate on the issues that mattered most, especially in areas where the Constitution or statutes vested them with personal decisional authority. In this respect, modern presidents confront a qualitatively different supervisory situation from the one faced by George Washington, who stood atop a federal bureaucracy of infinitesimal size, by modern standards. In the end, the simple fact that modern presidents themselves have embraced independent agencies furnishes a strong reason for the rest of us to make room for these agencies as we ponder the laconic language of Article II.

A REMARKABLE AND COMPREHENSIVE PATTERN has emerged in the preceding pages. On issue after issue and in institution after institution, America's unwritten Constitution and America's written Constitution mutually reinforce one another. For example, modern unenumerated-rights jurisprudence does justice to the words of the Ninth and Fourteenth

Amendments, which in turn invite judges to listen carefully to what ordinary Americans in word and deed claim as their rights. In judicial decisions far afield of unenumerated rights, large sectors of Warren Court and post–Warren Court constitutional case law build upon the written Constitution's basic blueprint. (The exclusionary rule is the major exception.) In their actual organization and operation, all three branches of the federal government gloss the terse text.

America's written Constitution lives—in America's unwritten Constitution.