

# THE NEVER-ENDING ASSAULT ON THE ADMINISTRATIVE STATE

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## INTRODUCTION

The administrative state is under attack. It is always under attack. Even decades after the main contours of the administrative state were sustained by the Supreme Court, it is still under attack. This Article is an exploration of the primary contours of the attack and a discussion of the reasons why the attack has been and should remain largely unsuccessful.

It should not be surprising that the assault on the administrative state is never ending. The subjects of regulation have strong incentives to resist burdensome regulation with every available tool, including judicial review of agency action directed against them. In the course of litigation, regulatory subjects deploy whatever legal arguments are available, including those directed at the structure of the administrative state, which takes the assault on the administrative state far beyond aggressive judicial review of the substance of agency action and compliance with statutory procedural requirements into the realm of structural constitutional law. Although the Supreme Court has long approved of the structural foundations of the administrative state, a substantial number of lower court judges are sympathetic to arguments attacking that structure, and once in a while, an attack succeeds, which fuels the perception that the legitimacy of the administrative state remains an open question.

Despite the fact that the Supreme Court has approved and sometimes even strongly endorsed key aspects of the administrative state, administrative state skeptics have powerful constitutional and policy arguments on their side. Constitutional skeptics have long complained about the “headless fourth branch of government” that has “deranged” the three-branch constitutional structure and usurped the legislative, judicial, and executive powers

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allocated to the other branches.<sup>1</sup> Democratic accountability is absent when government power is wielded by unelected bureaucrats. Policy skepticism is grounded in the view that the growth of the administrative state is an unwarranted expansion of the reach of government that produces stifling and unnecessary regulation. Job losses, high prices, and the inability of American businesses to compete in international markets are all attributed by skeptics to the excesses of the administrative state. The never-ending assault on the administrative state is a sustained effort to attack these unfortunate constitutional and political developments.

The assault on the administrative state is conducted on several fronts with various weapons. Legal challenges, of course, are carried out in the courts. The legal assault on the administrative state spans a broad range including fundamental constitutional challenges to the structure of administrative agencies, vigorous enforcement of statutory and constitutional procedural requirements against agencies and intensive scrutiny of the factual and policy bases of agency action. With the appointment of Justice Neil Gorsuch and the likelihood of additional vacancies in the near future, the Supreme Court may become more receptive to elements of this legal assault.

Politically speaking, with Republican control over both houses of Congress, and now the presidency as well, the push to limit regulation, which includes elements of the assault on the administrative state, has moved front and center onto the legislative agenda. Republicans in Congress are generally more receptive to businesses' arguments against excessive regulation and to constitutional attacks on the structure of the administrative state. The House has passed reforms of the administrative state for years, only to see them die in the Senate under the cloud of a certain veto by former President Obama. These proposed reforms would increase the procedural and analytic burdens agencies must bear before issuing important regulations and they would decrease or even prohibit judicial deference to agency determinations. Senate rules still make passage of the more extreme elements of House bills unlikely, but the chance that some legislation will make it to President Donald Trump's desk is much greater than before.

In the academy, scholarly attacks on the administrative state have reached a new crescendo with the 2014 publication of Professor Philip Hamburger's book *Is Administrative Law Unlawful?*<sup>2</sup> This volume is an ele-

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1 The phrase "headless 'fourth branch' of the Government" was apparently coined by the Brownlow Commission, which was appointed by President Franklin Delano Roosevelt to study administrative procedure as part of the process that led to the passage of the Administrative Procedure Act of 1946. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT: ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 29 (1937). The phrase was used as recently as 2016 in an opinion by Judge Brett Kavanaugh for a panel of the D.C. Circuit, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016), and in 2013 by Chief Justice John Roberts in a dissent from what he viewed as an unwarranted extension of judicial deference to agency legal determinations that implicate the agency's jurisdiction. *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).

2 PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

gant and comprehensive attack on the administrative state and is quickly becoming the bible of administrative state skeptics, including scholars, lawyers, policymakers, and even judges. In an apparent effort to make the argument more accessible to nonscholars, Professor Hamburger published a pamphlet entitled *The Administrative Threat*, which distills the attack into a sixty-four-page polemic.<sup>3</sup> The pamphlet's penultimate sentence sums up Hamburger's conclusions as follows: "Americans therefore need to recognize that administrative power revives absolute power and profoundly threatens civil liberties."<sup>4</sup> This is a rhetorical call to arms against the foundations of the administrative state.

Hamburger's argument is powerful but ultimately misguided. Following Hamburger would result in a massive shift of power from Congress to the federal courts, with judges rather than legislators determining the appropriate structure of government and the scope of federal power. Further, Hamburger would disable the federal government from dealing effectively with the myriad challenges facing modern society. In fact, that's the way of most attacks on the administrative state. Administrative state skeptics would have courts reject Congress's policies and design in favor of a more conservative set of policies and a structure based on judicial reconstruction of the intent of the Framers of the Constitution, without the sort of firm constitutional grounding that ought to be required to justify such intensive judicial intervention, and they present no persuasive evidence that their reforms would not cripple the government's ability to advance important policies. While enforcement of clear constitutional provisions is normally appropriate, applying general notions of separation of powers or government accountability to restructure the government should be viewed as beyond judicial power.

This Article is an exploration of the twists and turns of the never-ending assault on the administrative state. Without attempting to resolve all of the separation of powers controversies that have existed since the beginning of the Republic, this Article examines and analyzes the fundamental constitutional challenges to the administrative state as well as the more peripheral constitutional difficulties involving the administrative state and the nonconstitutional legal challenges that have arisen over the decades. In my view, the legal and political arguments made in favor of major structural changes to the administrative state do not provide sufficient normative bases for such change. In fact, most of them are inconsistent with a reasonable understanding of the Constitution of the United States and are normatively inferior to the status quo.

The Article proceeds as follows. Part I sets forth the key elements of the administrative state, as designed by Congress and approved by the Supreme Court. Part II sets out and analyzes the assault on the administrative state in the courts, Congress, and, to a lesser extent, the executive branch itself. And

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3 PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* (2017).

4 *Id.* at 64.

Part III discusses the scholarly assault on the administrative state, focusing largely on the work of Gary Lawson and Phillip Hamburger.

### I. JUDICIAL AND LEGISLATIVE APPROVAL OF THE STRUCTURE OF THE ADMINISTRATIVE STATE

The administrative state was designed by Congress and has been resoundingly approved by the Supreme Court of the United States. That's not to say that Congress's power is unlimited. The Supreme Court has frequently rejected congressional efforts to violate clear constitutional commands and has occasionally turned back innovations that it finds too threatening to the balance of power established by the Constitution. Administrative state skeptics, especially in the academy, seem undeterred, and continue to take aim at the heart of the administrative state. Unfortunately for administrative state skeptics, the courts and Congress consistently turn those efforts back, maintaining the features of the administrative state by and large intact.

The key structural features of the administrative state include delegation of discretionary authority from Congress to the executive branch; independence of some agencies through insulation of agency officials from complete presidential control; the combination of executive, quasi-legislative, and quasi-judicial functions within single agencies; administrative authority to inspect the premises of regulated entities and to require them to provide information to regulators; initial adjudication of regulatory disputes within administrative agencies; and deferential judicial review of agency action. Each of these features has been approved resoundingly by the Supreme Court, albeit sometimes with important qualifications. Substantively, the administrative state depends on acceptance of broad regulatory power and, at the federal level, an expansive understanding of Congress's enumerated powers, mainly the power to regulate interstate commerce and the power to attach conditions on the receipt of federal funds. Substantive regulatory power has also been resoundingly approved by the Supreme Court, perhaps even more firmly than the structural aspects of the administrative state.

Turning to substance first, the end of the *Lochner*<sup>5</sup> era signaled judicial acceptance of broad regulatory power at the federal and state levels. During the late nineteenth and early twentieth centuries, the Supreme Court employed substantive due process and related constitutional doctrines to place significant limits on governmental regulatory power. State and federal laws regulating wages, hours, prices, and more were struck down as infringing on constitutionally protected liberty, property and contract rights. By the end of the 1930s, the Supreme Court changed its tune and began upholding regulatory laws, transforming substantive due process from relatively inten-

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5 Named for *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down a state law limiting the hours bakers were allowed to work despite evidence that long hours of exposure to the dust in bakeries was dangerous to the health of the workers.

sive scrutiny of economic regulations into a minimal requirement of rationality.

While the demise of *Lochner* may have enabled extensive state regulation, an evolving view of federalism was necessary to unleash federal regulatory power. The federal government already had authority to regulate interstate transportation and other clearly interstate economic matters, but general authority to regulate economic activity was thought to be beyond federal power. The 1942 watershed decision in *Wickard v. Filburn*<sup>6</sup> changed the federal-state balance by recognizing federal power, under the Commerce Clause, to regulate virtually all economic activity with interstate effects. The scope of federal regulation quickly expanded to encompass extensive regulation in virtually every nook and cranny of the economy.

In areas in which even this expansive view of federal regulatory power is not broad enough, Congress can resort to its constitutional power to “provide for the common Defence and general Welfare of the United States”<sup>7</sup> to expand its regulatory reach even further. The Court views this power as even broader than the power over interstate commerce, allowing Congress to expend federal funds in pursuit of its vision of the “general Welfare” and to attach conditions on these expenditures that go beyond Congress’s enumerated regulatory authority. A familiar example is federal imposition of a minimum age of twenty-one for the purchase and consumption of alcohol.<sup>8</sup> Although actually setting the drinking age may be reserved to the states, Congress has effectively set it at twenty-one by conditioning the receipt of federal highway funds on state adoption of the twenty-one-year-old requirement. Massive federal spending in diverse areas such as education, transportation, the environment, and more has allowed the federal government to set standards in areas in which direct federal regulatory authority would be in serious doubt.

These features of the regulatory landscape are decried by administrative state skeptics who advocate a return both to the *Lochner* era’s understanding of governmental regulatory power and to a more state-centered regulatory regime. Although the Supreme Court periodically rejects Congress’s efforts to expand its regulatory power even further, and sometimes imposes apparently novel limitations on federal power, the substantive landscape of federal (and state) regulatory authority is well established and unlikely to change significantly in the foreseeable future. A brief look at Court decisions rejecting federal regulatory authority reveals that the limits they impose are marginal and do not threaten the core of federal power. Two examples are worth mentioning here: the anticommandeering doctrine and the coercion prong of the Court’s spending power jurisprudence.

In 1992, the Supreme Court created what has become known as the anticommandeering doctrine. This doctrine holds quite simply that the federal government cannot require state and local officials to execute federal

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6 317 U.S. 111 (1942).

7 U.S. CONST. art. I, § 8, cl. 1.

8 The statute was upheld in *South Dakota v. Dole*, 483 U.S. 203 (1987).

law. The first statute that was struck down required states, in certain circumstances, to assume ownership and responsibility over hazardous waste.<sup>9</sup> The second statute that was struck down required local officials to conduct background checks pursuant to federal gun control legislation.<sup>10</sup> Nothing in either decision even remotely suggests that the federal government could not establish its own program for dealing with hazardous waste or gun control. Thus, the anticommandeering doctrine is not a significant substantive limitation on federal regulatory power.

The Court has also imposed limits on Congress's ability to regulate via conditions on the receipt of federal funds. Conditions must be germane to the federal program to which they are attached, they must be stated clearly in the federal statute, the conditions must not themselves be unconstitutional, and states may not be coerced into accepting the conditions.<sup>11</sup> These conditions are thought to help preserve what's left of the traditional federalism balance of authority between states and the federal government. Most recently, the Court struck down the Affordable Care Act's requirement that states substantially expand their Medicaid programs to continue to receive any federal Medicaid funding.<sup>12</sup> The Court found that the potential loss of all Medicaid funding, which can amount to ten percent or more of a state's budget, was so devastating that states were effectively coerced into accepting the expansion.<sup>13</sup> While this conclusion is dubious, given Congress's unquestioned power to repeal and replace Medicaid with a restructured program,<sup>14</sup> a finding of coercion is likely to be made only in extreme cases, leaving the core of federal regulatory authority under the spending power intact.

The Supreme Court has also firmly accepted the fundamental structural features of the administrative state. A key starting point is the understanding that the Court does not evaluate structural features of the administrative state by measuring them against an ideal conception of the separation of powers. Rather, the first and most important question in any case challenging a structural innovation is whether it violates a particular procedural or structural provision of the Constitution. If it does, the Court enforces the provision and rejects Congress's handiwork. If not, the Court is very deferential to Congress's judgment and will strike down a structural feature of the administrative state only when it perceives a serious threat to the balance of power among the three branches of government.

One of the key features of the administrative state, and the one that is consistently attacked most vociferously by administrative state skeptics, is

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9 See *New York v. United States*, 505 U.S. 144 (1992).

10 See *Printz v. United States*, 521 U.S. 898 (1997).

11 See *Dole*, 483 U.S. at 207–08.

12 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

13 *Id.* at 582.

14 See *id.* at 636–37 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). See generally Jack M. Beermann, *NFIB v. Sebelius and the Right to Health Care: Government's Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 277 (2015).

Congress's power to delegate discretionary authority to the President and administrative agencies. In history that is not worth repeating here in any significant detail, the Supreme Court has basically rolled over and played dead whenever a statute is challenged as granting the President or an agency too much discretionary power, except for a brief period in the early twentieth century when it struck down a small number of the elements of President Roosevelt's New Deal program as including insufficient constraints on executive branch decisionmaking.<sup>15</sup> Before and since, the Court has turned away numerous challenges based on excessive delegation. Most recently, the late Justice Scalia, known to have been an ardent champion of separation of powers, declared for a unanimous Court (while quoting one of his earlier dissenting opinions), that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."<sup>16</sup> Further, Congress has instructed federal courts reviewing the exercise of regulatory discretion to defer to agency judgments, and the courts, including the Supreme Court, have embraced that requirement with alacrity. There may be persuasive normative reasons to be skeptical of congressional delegation of regulatory authority, but the Constitution has not been read to embody them.

Related to the acceptance of an exceedingly weak version of the nondelegation doctrine is the Court's wholehearted acceptance of legislative rulemaking by administrative agencies. In a footnote to the *Chadha*<sup>17</sup> decision, in which the Court struck down the legislative veto as inconsistent with the Constitution's requirements of bicameralism and presentment, Chief Justice Burger explained why it was constitutionally proper for the executive branch to make legally binding discretionary policy decisions without engaging in the bicameralism and presentment that is required for Congress to take similar action.<sup>18</sup> This is an extremely important footnote, perhaps the most important regarding separation powers in any Supreme Court opinion, and thus this extensive quotation from it is worth considering:

Congress protests that affirming the Court of Appeals in these cases will sanction "lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?" To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." See 5 U.S.C. § 551(4), which defines an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe *law* or policy . . . ." This Court has referred to agency activity as being "quasi-legislative" in character. Clearly, however, "[i]n the framework of our Constitution, the President's power to

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15 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

16 *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (internal quotation marks omitted).

17 *INS v. Chadha*, 462 U.S. 919 (1983).

18 *Id.* at 953–54 n.16.

see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” . . . The bicameral process is not necessary as a check on the Executive’s administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General’s execution of the authority delegated to him . . . involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always “ascertain whether the will of Congress has been obeyed,” and can enforce adherence to statutory standards. It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble “legislative” action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. . . . Congress’ authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.<sup>19</sup>

There is so much going on in this footnote that an entire article could be written about it, but most important for present purposes is the *Chadha* Court’s recognition that when agencies promulgate legislative rules, they are executing the law, not making it.

Another key sticking point for administrative state skeptics is the lack of complete presidential control over the execution of the laws. To many judges, scholars, and commentators, the Constitution’s command is crystal clear—Article II’s first sentence vests all executive power in the President and proper performance of the President’s duty to “take Care that the Laws be faithfully executed” requires that the President have complete control over every aspect of the administration.<sup>20</sup> However, despite some expansive dicta in an opinion written by Chief Justice—and former President—William Howard Taft,<sup>21</sup> the law as created by the Supreme Court has long been otherwise. The Court does not view the Vesting Clause as embodying an operational command of complete presidential control and it has approved congressional restriction of presidential authority over the execution of the laws mainly by upholding statutory restrictions on the ability of the President to fire agency personnel. Judicial disapproval of the independence of independent agencies at this late date would be an avulsive change in the structure of the United States government.

To administrative state skeptics, the combination of executive, quasi-legislative, and quasi-judicial functions within single agencies is among the most corrosive aspects of the administrative state. The skeptics view this as violat-

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19 *Id.* (first, second, and third alterations in original) (citations omitted).

20 U.S. CONST. art. II, § 3.

21 *See Myers v. United States*, 272 U.S. 52 (1926).



ing fundamental notions of due process and separation of powers. Although they may have a normative point, legally there is no serious question that the combination of functions is constitutional. While the Administrative Procedure Act (APA), and perhaps due process, require insulation of those performing the initial agency adjudications from political control, the accepted view is that agency heads may employ all three forms of governmental action because, regardless of form, as the *Chadha* Court recognized, agencies are actually performing only executive functions when they make rules and adjudicate whether the rules, or a statute, have been violated.

Another key aspect of judicial approval of the administrative state is judicial acceptance of the mechanisms by which administrative agencies collect information about the entities under their regulatory authority. This includes acceptance of the authority of administrative agencies, pursuant to congressional authorization, to inspect the premises of regulated entities and broad authority to require regulated entities to provide information to regulators. There are two legal regimes under which inspections are conducted, neither of which significantly hampers the ability of agencies to inspect private premises. For traditionally closely regulated industries, such as those involving alcoholic beverages, the firearms trade, and dangerous activities such as mining, the Court has approved warrantless inspections on the theory that such entities lack any reasonable expectation of privacy. For all other regulated industries, the Court has held that judicially issued warrants are required before entities may be compelled to allow inspections, but probable cause in the criminal-law sense is not required. Rather, an agency may obtain a warrant simply by showing that the inspection is legally authorized and conducted pursuant to a reasonable plan for inspecting regulated entities.<sup>22</sup> No indication or suspicion of wrongdoing is required.

Agencies may also issue subpoenas to require regulated entities to provide information to regulators. In recognition of separation of powers requirements, agencies may not enforce their subpoenas without a judicial order, just as for most industries agencies must obtain judicial warrants to compel inspections of premises. If a regulated entity refuses to comply with a subpoena, the agency must apply to a federal court for an order enforcing it. However, the Supreme Court has repeatedly made it clear that enforcement of agency subpoenas should be routine. Courts should enforce agency subpoenas whenever they are relevant to a facially valid agency proceeding, and the word “relevant” should be understood generously as encompassing any information that might “shed light” on the proceeding.<sup>23</sup>

Another important structural feature of the administrative state is that initial adjudication of many regulatory disputes may take place within administrative agencies. This feature of the administrative state is less secure than others because of lingering controversy and uncertainty over when agency

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22 See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); see also *infra* note 179 and accompanying text.

23 See *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166 (2017).

adjudication is permissible.<sup>24</sup> There are two important constitutional aspects to this. First, although the Supreme Court has generally found agency adjudication to be consistent with Article III's vesting of the judicial power of the United States in the federal courts, it has imposed significant limitations on it especially when agencies are entrusted with adjudicating private rights that arise under state common law. Further, lingering confusion in the caselaw has left this area unsettled. Second, administrative agencies are capable of providing due process even when the adjudication involves issues concerning an agency's own regulatory program. Due process is violated if an adjudicator has a personal stake in the outcome of the litigation but not when an agency seeks to enforce regulatory standards, even those it created through rulemaking or prior adjudication.

The final pillar of the administrative state detailed here is the acceptance of deferential judicial review of agency decisions. Although deferential review of agency action extends back to the infancy of administrative law, the adoption of the APA in 1946 embodied Congress's strong endorsement of deferential review. Not only has the Supreme Court embraced deferential judicial review under the arbitrary-capricious and substantial evidence standards, it has sometimes gone beyond Congress's commands and prescribed even more deferential standards. While there is a good chance that the Supreme Court will revisit and even cut back on some of the more extreme forms of deference, especially the *Chevron*<sup>25</sup> and *Seminole Rock*<sup>26</sup> doctrines under which courts defer to agency legal decisions, deference to agency factual and policy determinations is firmly entrenched in the administrative law firmament. The Court has even endorsed deference to agencies on procedural questions, creating a black-letter rule of administrative law that absent a due process violation, reviewing courts may not require procedures in addition to those required by the APA or any other applicable statute or rule.<sup>27</sup> The Court has also embraced congressionally created exemptions from judicial review, which in effect shield some agency actions from any judicial scrutiny for obedience to Congress's commands whatsoever. The clear implication of the acceptance of unreviewability for some agency actions is that there is no generally applicable constitutional right to judicial review of agency action.<sup>28</sup>

This brief roadmap establishes the baseline against which historical and contemporary assaults on the administrative state should be judged. As we

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24 See *Stern v. Marshall*, 564 U.S. 462 (2011); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); see also *infra* notes 168–69 and accompanying text.

25 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

26 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

27 See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

28 The exception is that Article III may require judicial review of agency adjudicatory action involving private rights. Further, agencies may be constitutionally required to go to court and seek a warrant or subpoena to compel regulated entities to allow access to their premises or documents.

shall see, each of these features of the substantive and procedural structure of administrative law has been or is currently under attack, sometimes head-on but often only at the margins. As a general matter, although the assault is likely to continue, the administrative state will likely survive, perhaps with some alterations, some of which may be substantial but most of which are likely to be marginal. The reasons for this are twofold. First, as a practical matter, there is not likely to be sufficient political support for major structural changes to the administrative state. Second, the legal and political arguments made in favor of major structural changes do not provide a sufficient normative basis for such change. In fact, most of them are inconsistent with a reasonable understanding of the Constitution of the United States or are normatively much less attractive than the status quo.

## II. THE ASSAULT ON THE ADMINISTRATIVE STATE IN THE FEDERAL COURTS, CONGRESS, AND THE EXECUTIVE BRANCH ITSELF

The assault on the administrative state in the courts is both sporadic and constant. It is sporadic in the sense that occasionally the Supreme Court issues an opinion or a series of opinions that seems to cast doubt on the legitimacy of the entire structure of the administrative state. Usually, the hopes of administrative state skeptics are dashed as it becomes clear that the Court's steps are actually quite moderate, making marginal adjustments to the structure of government while leaving the core intact. The assault is constant in that challenges to the administrative state seem to be lurking in the background all of the time, perhaps in a case decided by a court of appeals or in scholarship decrying the perversion of the Constitution's blueprint for the structure of the government. The U.S. Court of Appeals for the District of Columbia Circuit has been the most active and creative in this regard, regularly issuing decisions that cast doubt on important aspects of the structure of the administrative state or particular agencies.

Legislatively, for the most part Congress has been supportive of the administrative state. After all, the existence and structure of federal agencies is based on statutes passed by Congress. Congress consistently delegates authority to administrative agencies, shields some of them from complete presidential control, and prescribes deferential judicial review of agency action while occasionally exempting some agency actions from review altogether. For the past decade, however, Republicans in Congress—mainly in the House of Representatives—have proposed a flurry of legislation aimed at making major reforms to the administrative state, some of which would fundamentally alter the constitutional position of administrative agencies, while others would significantly slow down the regulatory process thereby reducing the volume of regulation.

There have also been some efforts at reform inside the executive branch, mainly in terms of bringing agencies under greater presidential control. But for reasons that should be obvious, the executive branch itself is unlikely to be the source of reforms that would significantly reduce its own power.

### A. *Sporadic Action at the Supreme Court*

Although various aspects of the administrative state have been attacked in cases that have reached the Supreme Court, very few if any of the cases had the potential to significantly alter the structure of the administrative state. The vast majority of separation of powers cases involve marginal attacks on Congress's regulatory authority and Congress's power to structure the federal government; most involve the executive branch and some involve the judicial branch. This should not be surprising. Although, as discussed above, litigants have incentives to raise arguments against administrative fundamentals to win their cases, they rationally realize that such arguments will only rarely succeed. Thus, absent an ideological commitment, they will not form the centerpiece of many challenges to agency action.

In terms of the government's general regulatory powers, the rejection of *Lochner*-type scrutiny of government regulation seems extremely unlikely to change. Although there are those who long for a return to a more libertarian understanding of the regulatory powers of federal and state government, the closest that courts have come to anything remotely approaching *Lochner*-style heightened scrutiny of economic regulation is the occasional application of what appears to be a relatively stringent standard of nonconstitutional judicial review of agency action under the arbitrary-capricious standard and the substantial evidence test. Being nonconstitutional, this is no threat to Congress's power. Of course, litigants are likely to employ any available legal tool to escape costly regulation, but there is no currently available nonfrivolous legal argument for substantial limits on Congress's regulatory powers.

The expansion of federal power under the Commerce Clause and spending power also does not appear to be under threat. The application of the anticommandeering doctrine<sup>29</sup> and the rejection of federal commerce power over traditional areas of noneconomic state criminal jurisdiction<sup>30</sup> might hint that the Court is willing to reexamine the twentieth century's massive expansion of the commerce power, but so far it is only the slightest of hints. The scope of the Environmental Protection Agency's jurisdiction has been questioned in court, and a decision against federal power might significantly reduce some aspects of federal authority. The cases do not, however, portend a fundamental contraction of federal regulatory power. In fact, conservative members of the Supreme Court might be reluctant to participate in the contraction of federal power because federal preemption of state law has been a powerful tool for the conservative projects of reining in overboard state-level regulation and displacing proplaintiff common law. The Court's relatively recent rejection of the Medicaid expansion under the Affordable Care Act might be taken as a signal that the Court is willing to reexamine Congress's ability to place conditions on the receipt of federal funds that go beyond Congress's enumerated powers,<sup>31</sup> but nothing in the opinion sug-

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29 See *South Dakota v. Dole*, 483 U.S. 203 (1987).

30 See *United States v. Lopez*, 514 U.S. 549 (1995).

31 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

gests that it was anything more than the application of the preexisting prohibition on the coercive use of the spending power. The Court has reviewed several cases involving attacks on conditions Congress has imposed on the receipt of federal funds and it has not recently suggested that Congress's authority is limited to pursuing its other enumerated powers.<sup>32</sup>

Attacks on the structure of agencies have been more successful at the Supreme Court than attacks on the scope of federal regulatory power, but there is still no suggestion that the Court is interested in requiring fundamental changes to the structure of the administrative state. There was a flurry of decisions in the 1970s and 1980s that suggested renewed interest at the Supreme Court in enforcing separation of powers limits on government structure, but none of the decisions actually supported the administrative state skeptics' hopes for fundamental change. If anything, they reinforced the very limited role that general principles of separation of powers play in judicial scrutiny of structural innovation.

The eighties began with the puzzling decision in *The Benzene Case*,<sup>33</sup> which hinted at reinvigoration of the nondelegation doctrine. The nondelegation doctrine is a bellwether for enforcement of general principles of separation of powers because, like doctrines concerning the President's power to remove executive branch officials, it is not based upon a specific procedural or structural provision of the Constitution. In *The Benzene Case*, the Court had to decide whether OSHA's policy of regulating workplace exposure to carcinogens to the limits of economic and technological feasibility was consistent with the Occupational Safety and Health (OSH) Act.<sup>34</sup> The Agency's policy was based on its understanding of 29 U.S.C. § 655(b)(5), which codified section 6(b)(5) of the OSH Act,<sup>35</sup> and required OSHA to regulate toxic substances on a standard that "most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity."<sup>36</sup> The Court, in a plurality opinion by Justice Stevens, held that all workplace standards, including those subject to § 655(b)(5), had to comply with § 652(8)'s requirement that all such standards be "reasonably necessary or appropriate."<sup>37</sup> This, according to the Court, requires that before any new standard is adopted, the agency must reasonably conclude that the status quo presents a "significant risk of harm."<sup>38</sup> Otherwise, the new standard could not be reasonably necessary or appropriate.

Thus far, the *Benzene* decision appeared to be a simple question of statutory interpretation. But, perhaps in response to a concurring opinion by Jus-

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32 See, e.g., *Dole*, 483 U.S. 203.

33 See *Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607 (1980).

34 *Id.* at 611.

35 Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(b)(5), 84 Stat. 1590, 1594 (codified as amended at 29 U.S.C. § 655(b)(5)).

36 29 U.S.C. § 655(b)(5) (2012).

37 *Id.* § 652(8).

38 *The Benzene Case*, 448 U.S. at 642.

tice Rehnquist in which he argued that the OSH Act was so vague as to constitute a delegation of legislative power to the Agency, Justice Stevens went on to observe that if the government's view was correct, that the Agency had the power to regulate even in the absence of a significant risk of harm, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional" under the nondelegation doctrine.<sup>39</sup> The opinion is puzzling because it is difficult to gain a firm grasp on the relevance of nondelegation principles to the decision. In any case, after this decision, the nondelegation doctrine was deployed by litigants in a number of cases, all of which were unsuccessful, and any suggestion that the Court was ready to reinvigorate the nondelegation doctrine was laid to rest in the Court's 2001 decision upholding a key provision of the Clean Air Act against a nondelegation challenge.<sup>40</sup> More on that decision below.

A significant proportion of the separation of powers disputes that reach the Supreme Court involve the power of the President to appoint and remove executive branch officials. Appointments disputes, which involve application of the Constitution's Appointments Clause,<sup>41</sup> are discussed below. Removal disputes, which are more common, are not governed by any particular provision of the Constitution and thus are more indicative of the Court's general attitude toward separation of powers. Although removal attacks keep coming, and the Court has accepted some of them,<sup>42</sup> there is no indication that the Court is likely to fundamentally limit Congress's ability to shield most officials from unlimited presidential removal. This is consistent with the general understanding of separation of powers in United States law, that when no particular procedural or structural provision of the Constitution applies, the Court is very forgiving and intervenes only when it views Congress's restrictions on another branch as threatening that branch's ability to fulfill its constitutional function.

Removal attacks have the potential to significantly restructure the administrative state because they are related to the resurgence of the unitary executive theory, under which the entire executive branch must be under the complete control of the President. This theory would go even further than Chief Justice Taft's suggestion in dicta in 1926, that all principal officers, but not inferior officers, must be removable by the President at will.<sup>43</sup> Under the unitary executive theory, not only must all executive branch officials be subject to unfettered presidential removal, the President would have complete control over the execution of the laws, regardless of legislative delegation to a particular official, department, or agency. Congress's specification of terms

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39 *Id.* at 646.

40 *See* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

41 U.S. CONST. art. II, § 2, cl. 2.

42 *See, e.g.,* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (invalidating two levels of for-cause protection for members of the Public Company Accounting Oversight Board); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress may not assign executive powers to officials removable by Congress).

43 *See* *Myers v. United States*, 272 U.S. 52 (1926).

of office for agency heads and other officials would become meaningless if the President could fire any of them at will. (Bipartisanship and professional qualification requirements for agency membership could also be thrown into doubt if the President, under the unitary executive theory, claims that any restrictions on appointment and removal are unconstitutional.) Congress might be unwilling to delegate much authority to agencies that would be under the complete control of the President especially in light of the political reality that independent agencies are often designed to maximize Congress's influence. This might lead Congress to cut back on delegations enough to make significant changes to the administrative state.

Thus, although outlawing removal restrictions might result in significant administrative state reform, there is little if any indication in any removal decision in decades of a likelihood that the Court would seriously consider doing so.<sup>44</sup> The Court's 1988 decision upholding a for-cause restriction on the removal of the Independent Counsel, a federal prosecutor, and assigning removal authority to the Attorney General, and not the President, marked the doctrinal entrenchment of Congress's power to restrict removal.<sup>45</sup> Prior to that decision, the Court's theoretical justification for removal restrictions was the need to protect agency officials performing quasi-legislative and quasi-judicial functions.<sup>46</sup> The current justification is a direct endorsement of Congress's power to restrict presidential power across the executive branch, based on the lack of a constitutional provision controlling removal and a simple judgment that the presidency does not need complete control to successfully fulfill its constitutional functions. In short, the President's desire for complete control does not override Congress's power to legislate.

Justice Scalia's dissent in *Morrison v. Olson* may be the judicial high-water mark of the unitary executive theory in the context of removal of officials engaged in executive functions.<sup>47</sup> Justice Scalia attacked removal restrictions on two fronts, formalist and pragmatic. His formalist attack, based on Article II's Vesting Clause, failed to move the law significantly toward complete presidential control.<sup>48</sup> The majority's decision resulted in a major expansion of the theoretical basis for removal restrictions. The Constitution's vesting of

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44 There has been some rhetoric that may give comfort to advocates for complete presidential control, but no real suggestion that the Court is likely to make major changes to the law. The opening of Chief Justice Roberts's opinion for the Court in the *PCAOB* case, in which he quoted George Washington as characterizing all executive branch officials as there to "assist the supreme Magistrate" is the best example of expansive rhetoric in favor of presidential control. *Free Enter. Fund*, 561 U.S. at 483 (quoting *Letter from George Washington to Eléonor François Élie, Comte de Moustier* (May 25, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 334 (John C. Fitzpatrick ed., 1939)). The Court's decision, however, endorsed removal restrictions for principal officers (SEC Commissioners) and therefore cannot be viewed as anything more than a small adjustment to removal jurisprudence. *Id.* at 486–87.

45 See *Morrison v. Olson*, 487 U.S. 654 (1988).

46 See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

47 *Morrison*, 487 U.S. at 697–734 (Scalia, J., dissenting).

48 See *id.*

executive power in the President has never been read as requiring complete presidential control over the executive branch. His pragmatic attack was much more powerful. His argument, in a nutshell, was that the continued ability of the President to carry out the constitutional functions of the office depends on the complete loyalty of all officials engaged in executive functions.<sup>49</sup> To Scalia, the President's unilateral authority to control prosecutors was necessary for self-preservation. Just as Congress protects itself by exempting itself from laws, the President protects the executive branch by deciding when and, more importantly, when not to investigate or prosecute executive branch officials.

Considerations like those contained in Justice Scalia's pragmatic argument, combined with the mess created by the Independent Counsel's investigation of President Bill Clinton, may have persuaded Congress not to renew the Independent Counsel Act, but it has not persuaded the Supreme Court to reexamine its permissive attitude toward removal restrictions generally. In fact, politically there seems to be a strong consensus rejecting Justice Scalia's premise that the President should have control over investigations and prosecutions of executive branch officials. There is a long tradition of Justice Department independence from direct presidential supervision, illustrated by the strongly negative reaction to suggestions that President Donald Trump may have asked former FBI Director James Comey not to take action against his (now-former) National Security Advisor Michael Flynn.<sup>50</sup> While Justice Scalia may have had a valid theoretical point, as a practical matter, attempts by the President to use the power of the presidency to shield executive branch officials from criminal investigations produce grave, perhaps intolerable, political consequences.

The vague standard governing removal restrictions has resulted in some complexity in the law. The Court has imposed limits on Congress's power to restrict removal while simultaneously endorsing removal restrictions even for principal officers. In 2010, the Court decided that to preserve the President's authority over the execution of the laws, Congress may not impose two levels of for-cause restrictions for firing Officers of the United States.<sup>51</sup> In other words, if the head or heads of an agency are removable only for cause, all officers inside the agency must be removable by the agency heads (or presumably the President) at will. The case involved the Public Company Accounting Oversight Board (PCAOB), an entity within the Securities and

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49 *Id.*

50 *Cf.* Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

51 *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). It is not clear if this prohibition applies to Administrative Law Judges (ALJs) who tend to be protected by two layers of for-cause restrictions when they work in independent agencies. The reasoning of *Humphrey's Executor* may be valid in this context—it would be inconsistent with due process for ALJs to be in constant fear for their job security. *See generally id.* at 507 n.10.



Exchange Commission (SEC).<sup>52</sup> However, no statute provided that members of the SEC were protected from at-will removal. The Court nevertheless decided the case as if the SEC Commissioners were so protected, and did not bat an eye at the prospect that the President could not fire them at will. If the members of the *PCAOB* majority thought they were undermining the structure of the administrative state, they were seriously mistaken. Instead, by reflexively accepting that SEC Commissioners were protected from dismissal without cause even though no statute so provided, they lent support to an important pillar of the administrative state. This confirms the fact that there is simply no theoretical support in American law for the unitary executive theory or the abandonment of decades of constitutional law concerning the structure of the executive branch.

Cases attacking Congress's prescribed method for appointing Officers of the United States periodically reach the Supreme Court. These cases generally present relatively simple questions concerning whether the prescribed method is consistent with the Appointments Clause and related constitutional provisions. No serious challenge has been mounted against the various restrictions on the President's appointment power, including bipartisanship requirements and qualifications for particular offices. The recent decision that the President may not make recess appointments when the Senate adjourns but continues to hold periodic pro forma sessions<sup>53</sup> may increase the Senate's leverage inherent in its power of advice and consent, but it does not carry the potential to fundamentally alter the structure of the administrative state.

Gillian Metzger is more concerned about the potential that the Supreme Court may lead a major upheaval in administrative law.<sup>54</sup> She notes that four current Supreme Court Justices, Chief Justice Roberts and Associate Justices Thomas, Alito, and Gorsuch, have "attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional."<sup>55</sup> With the Trump administration's anti-administrative state policies and a large number of judicial vacancies, Metzger observes that "the current judicial attack on the administrative state merits attention because of the potential harm it poses for the Court and for constitutional law."<sup>56</sup> Metzger arrives at a somewhat startling conclusion that not only is the administrative state constitutional, it is in a sense constitutionally mandatory because it provides the means necessary for the President to "take Care that the Laws be faithfully executed."<sup>57</sup> Whether Metzger's more pessimistic diagnosis is accurate remains to be seen.

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52 *Id.* at 484.

53 *See* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

54 *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

55 *Id.* at 3.

56 *Id.* at 6.

57 *Id.* at 89 (quoting U.S. CONST. art. II, § 3).

*B. Waves of Reform in the Lower Courts*

The lower courts, especially the U.S. Court of the Appeals for the District of Columbia Circuit, have been more receptive than the Supreme Court to attacks on administrative state fundamentals, although few if any cases are aimed directly at the pillars of the administrative state. This presents something of a paradox. Greater receptivity may incentivize litigants to broaden and deepen their attacks on administrative state fundamentals. However, a lower court cannot reject established Supreme Court precedent upholding the pillars of the administrative state. This means that unless they have reason to believe that the Supreme Court is open to changing course, litigants and lower court judges must be creative, finding ways to attack the administrative state from new angles that are not foreclosed by precedent.

More receptivity to attacks on the administrative state may be due to the lower courts' greater experience reviewing the merits of administrative action. They see the errors, overreach, arbitrary action, actions that appear to involve unnecessary or overly costly regulation, and the apparent imperviousness of some agencies to outside democratic influence or their capture by narrow special interests. Many of the lower court rulings directed at aspects of the administrative state seem to be inspired by concern over pathologies that exemplify or result in these or similar problems. Lower court judges are creative. They see a problem with administrative action and because the structure of the administrative state is solidly supported by Supreme Court precedent they come up with novel reasons for overruling agencies. Most of the time, the Supreme Court rejects novel reasoning and reaffirms administrative state fundamentals. Occasionally a novel approach sticks, but only very occasionally.

The best relatively recent example of this phenomenon is the attempt by the D.C. Circuit to use the nondelegation doctrine to attack perceived arbitrariness in agency actions.<sup>58</sup> To the skeptic, agency rules often appear arbitrary because they do not seem to be based on logical deduction from clear rules or standards and known, scientifically verifiable facts. In 1997, in obedience to Clean Air Act requirements, the Environmental Protection Agency (EPA) promulgated new National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The American Trucking Associations and others challenged the standards as unjustified, and one of their arguments was that the EPA's interpretation of the Clean Air Act's standard for NAAQS—"requisite to protect the public health" with "an adequate margin of safety"<sup>59</sup>—was so vague that it violated the nondelegation doctrine.<sup>60</sup> The D.C. Circuit agreed, observing that "what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too

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58 See *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub nom. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

59 42 U.S.C. § 7409(b)(1) (2012).

60 *Whitman*, 531 U.S. at 463.

much.”<sup>61</sup> In other words, what the D.C. Circuit wanted was for the agency to announce, in advance, how much harm to the public health was tolerable. Only then would the EPA’s regulatory choice be nonarbitrary. The D.C. Circuit seemed to rule out decisions based on unquantifiable agency judgments involving expertise and political considerations. The court translated these concerns into a conclusion that without a preannounced standard, the nondelegation doctrine was violated.

The Supreme Court dispatched this novel conclusion easily.<sup>62</sup> The focus of nondelegation doctrine scrutiny is on the statute, not the agency’s construction of it. A statute with no intelligible principle cannot be saved from invalidation by an agency’s narrowing construction,<sup>63</sup> just as a statute with an intelligible principle cannot be invalidated by an agency’s failure to read it properly. However, the D.C. Circuit had genuine reasons to be concerned. In its view, the agency’s action was potentially arbitrary because there was no way to falsify the agency’s reasoning. As the D.C. Circuit panel put it, “it is as though Congress commanded EPA to select ‘big guys,’ and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point.”<sup>64</sup> To the D.C. Circuit, the adoption of a more precise standard would increase the accountability of the agency, provide a check on arbitrary agency decisionmaking and facilitate judicial review. For present purposes, the important point is that allowing agencies to make rules only when they have previously announced a clear standard would work a major change in the administrative state, increasing certainty and accountability at the cost of flexibility and the ability to act in the face of uncertainty.

As a more general matter, the lower courts seem to be more concerned than the Supreme Court with the possibility that agencies act arbitrarily under the influence of political concerns. According to Adrian Vermeule,<sup>65</sup> substantive review of agency action is much more demanding in the lower courts than at the Supreme Court. In Vermeule’s view, lower courts look more closely at the logic and the scientific or factual basis for agency action than the Supreme Court, which applies what he terms a “thin” version of arbitrary, capricious review.<sup>66</sup>

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61 *Am. Trucking Ass’n, Inc.*, 175 F.3d at 1034.

62 *See Whitman*, 531 U.S. 457.

63 The D.C. Circuit erred doctrinally by equating an agency’s limiting construction with a court’s limiting construction. A court’s limiting construction, perhaps artificially in some circumstances, represents the legally binding meaning of the statute. It is attributable to Congress, and ensuring that Congress makes fundamental policy decisions is a key purpose of the nondelegation doctrine. The agency’s limiting construction is not attributable to Congress and represents only the agency’s view, not Congress’s.

64 *Am. Trucking Ass’n, Inc.*, 175 F.3d at 1034.

65 ADRIAN VERMEULE, *LAW’S ABNEGATION* (2016).

66 ADRIAN VERMEULE, *Thin Rationality Review*, in *LAW’S ABNEGATION*, *supra* note 65.

The pre-*Vermont Yankee*<sup>67</sup> lower court practice of increasing agency procedural requirements for rulemaking and informal adjudication beyond those specified in the APA was born of similar concerns. When an agency makes a momentous decision without much direct engagement with those whose interests are affected or without verifiable consideration of all aspects of the problem, administrative state skeptics are understandably troubled. They view such episodes as examples of the problems inherent in big, unresponsive government. Lower court judges smell the possibility of arbitrary decisionmaking, and one natural reaction of judges is to ramp up procedures, often to bring discretionary agency decisionmaking closer in form to traditional adjudication. In addition to stringent application of the APA's explicit requirements, which still occurs, lower courts before *Vermont Yankee* imposed additional procedural requirements, often grafting adjudicatory-type requirements onto legislative proceedings. Justice Rehnquist's opinion for the Court rejecting this practice in *Vermont Yankee* recognized, however, that what was at stake was more about substantive deference than procedural matters when he stated that "[f]inally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. . . . If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule."<sup>68</sup> What Justice Rehnquist was saying is that a simple legislative process is sufficient to produce the record required to support decisions under substantively "thin" judicial review.

There is a current controversy that has the potential to disrupt an important structural feature of the administrative state, namely the role of Administrative Law Judges (ALJs) within regulatory agencies. In particular, targets of enforcement by the SEC have challenged the SEC's choice to pursue enforcement actions before ALJs employed by the SEC rather than in federal court.<sup>69</sup> This challenge is motivated by questions of fairness—targets of SEC enforcement claim that the reason the SEC has increasingly turned to internal agency enforcement actions is that the agency has a "home field" advantage when it brings a case before an ALJ employed by the agency itself. This argument has been accepted by some federal judges and reportedly even by a member of the SEC.<sup>70</sup> The problem is that without evidence of actual bias, a finding of bias inherent in the simple fact that the ALJs work for the SEC

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67 In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court held that, absent constitutional problems, courts may not add to the procedures required by statute or agency rule.

68 *Id.* at 547–48.

69 See, e.g., *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *vacated*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc) (petition for review denied by an equally divided court), *cert. granted sub nom. Lucia v. SEC*, 138 S. Ct. 736 (2018).

70 See David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1158–59 (2016).

would be contrary to well-established principles of administrative law that have been accepted since the dawn of the administrative state.<sup>71</sup> In fact, as David Zaring reports, ALJ proceedings have been held up by the Supreme Court as a model of due process for others to follow.<sup>72</sup> Further, if the ALJs are viewed as biased, it would seem that the agency itself, which can rehear ALJ decisions *de novo*, would be even more biased because its members are chosen politically and they personally make the rules being enforced and supervise the officials doing the enforcing.

There is also a live issue concerning the constitutionality of restrictions on the removal of ALJs at the SEC and elsewhere.<sup>73</sup> ALJs in the federal system can be removed only for cause, which is considered important to ensure that they are sufficiently independent to provide fair hearings necessary for due process. However, in many agencies, most notably independent agencies, this potentially runs afoul of the rule announced by the Supreme Court in the *PCAOB* opinion that it is unconstitutional for Officers of the United States to be protected by two layers of for-cause removal restrictions. The Court, in the *PCAOB* opinion, reserved the ALJ issue, and for good reason—eliminating the ALJs’ protection from removal would place them under the direct supervision of politically appointed officials, which would raise real fairness questions.<sup>74</sup> In short, success on either of these challenges to the status of ALJs would have significant implications for the structure of the administrative state. A great deal of enforcement of regulatory standards could migrate to the federal courts and out of agencies.<sup>75</sup>

Another current controversy illustrates how lower court invalidation of a novel administrative state structure can ironically shore up overall legal support for the administrative state. In 2016, a panel of the D.C. Circuit, in a

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71 See *Withrow v. Larkin*, 421 U.S. 35 (1975); Zaring, *supra* note 70, at 1200.

72 Zaring, *supra* note 70, at 1200.

73 See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

74 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

75 There is also an ongoing challenge to the appointment of SEC ALJs, but invalidation of the method of appointing them would be simple to cure. See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *petition for cert. filed*, 86 U.S.L.W. 3180 (U.S. Sept. 29, 2017) (No. 17-475); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *cert. granted*, 138 S. Ct. 736 (U.S. Jan. 12, 2018) (No. 17-130). The Constitution provides that Congress may statutorily empower heads of departments to appoint inferior officers. U.S. CONST. art. II, § 2, cl. 2. SEC ALJs are appointed by the Chief ALJ of the SEC and the SEC’s Office of Human Resources. See *Bandimere*, 844 F.3d at 1177. The SEC conceded that if the ALJs are inferior officers, this method of appointment would be unconstitutional. See *id.* at 1176. The SEC contends that its ALJs are employees, not officers, because they cannot make policy for the Agency or even final decisions without at least the tacit approval of the full SEC. See *Raymond J. Lucia Cos.*, 832 F.3d at 283; *In re Raymond J. Lucia Cos.*, SEC Release No. 4190, 2015 WL 5172953 (Sept. 3, 2015). If the appointment of ALJs in the SEC is invalidated, the simple cure would be to have the SEC Commissioners themselves make the appointments, perhaps on recommendation of the current appointing authority. Unlike a hearing presided over by an ALJ removable by the enforcing agency, appointment by the head or heads of the enforcing agency would not likely present a serious due process question concerning the fairness of ALJ hearings.

decision that was vacated and replaced by a contrary ruling by the court sitting en banc, invalidated the for-cause restriction on the President's power to dismiss the Director of the Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank Act.<sup>76</sup> The CFPB is headed by a single Director appointed for a five-year term by the President with the advice and consent of the Senate.<sup>77</sup> The Director is removable by the President only for "inefficiency, neglect of duty, or malfeasance in office."<sup>78</sup> In an opinion written by Judge Brett Kavanaugh, who may fairly be characterized as an administrative state skeptic, the panel held that this limitation on the President's power to fire the Director was unconstitutional because, unlike every other independent agency with similar powers, the CFPB is headed by a single Director with enormous regulatory authority.<sup>79</sup> (The en banc court rejected this reasoning, concluding that "[t]he CFPB led by a single Director is as consistent with the President's constitutional authority as it would be if it were led by a group."<sup>80</sup>)

The panel did not condemn the scope of the CFPB's powers or even the exercise of those powers by an independent agency. Rather, the panel's problem with the CFPB was that the Director's power was unchecked by the necessity of consensus among multiple commissioners or board members. Although the original justification for multiple members of independent agencies was to shield them from political influence,<sup>81</sup> to Judge Kavanaugh, multimember agencies are more politically accountable than the unique single-member structure of the CFPB. The panel observed that "the Director of the CFPB possesses more unilateral authority—that is, authority to take action on one's own, subject to no check—than . . . any other officer in any of the three branches of the U.S. Government, other than the President."<sup>82</sup> Elaborating, Judge Kavanaugh explained that "[t]he Director alone decides what rules to issue; how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties to impose on violators of the law."<sup>83</sup> The court did not, however, order the agency to halt its proceedings. It did not hold that the agency's powers were too extensive to be exercised by a single director, so long as that director is removable by the President without cause. Thus, the remedy chosen by the court was to invalidate the restriction on the President's ability to remove the Director.

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76 See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and reh'g en banc granted*, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017). The en banc decision, rendered on January 31, 2018, rejected the panel's conclusion and upheld the CFPB's structure and its Director's removal provisions. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

77 *Id.* at 15 & n.3.

78 12 U.S.C. § 5491(c)(3) (2012).

79 *PHH Corp.*, 839 F.3d at 6.

80 *PHH Corp.*, 881 F.3d at 100.

81 See ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 153–55 (1941).

82 *PHH Corp.*, 839 F.3d at 6–7.

83 *Id.* at 7.

Two aspects of this decision are particularly notable. First, and most important, in the course of reaching its result, the panel appeared to strongly endorse a pillar of the administrative state, namely the exercise of extensive powers by multimember independent agencies protected by for-cause requirements from presidential discharge.<sup>84</sup> If the panel thought it was laying the foundation for a broader attack on the administrative state, it erred. Second, by endorsing the deliberative and process-oriented aspects of multimember agencies as substitutes for more traditional notions of separation of powers, the court was engaging in a form of reasoning that is usually eschewed by administrative state skeptics. As Judge Kavanaugh put it, “To help mitigate the risk to individual liberty, the independent agencies, although not checked by the President, have historically been headed by *multiple* commissioners, directors, or board members who act as checks on one another.”<sup>85</sup> Under this reasoning, novel structures like independent agencies are constitutionally permissible even if they deviate from the constitutional plan as long as alternative structures provide sufficient safeguards against arbitrary government action. This would open up vast possibilities for Congress to innovate on agency structure.<sup>86</sup>

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84 In a sense, Metzger’s analysis lends support to Kavanaugh’s view here. In arguing that the administrative state is “constitutionally obligatory,” Metzger observes that in an era of delegation of authority by Congress to the executive branch, the government must possess “sufficient bureaucratic apparatus and *supervisory mechanisms* to adequately oversee execution of these delegated powers.” Metzger, *supra* note 54, at 89 (emphasis added). Kavanaugh’s point can be understood as based, in part, on discomfort with the lack of supervision over the actions of the Director of the CFPB.

85 *PHH Corp.*, 839 F.3d at 6.

86 In my view, the panel’s opinion was infected by a serious error. The court characterized *Myers v. United States*, 272 U.S. 52 (1926), as recognizing “the President’s Article II authority to supervise, direct, and remove at will subordinate officers in the Executive Branch,” *PHH Corp.*, 839 F.3d at 5, and that *Humphrey’s Executor* created an exception to this for (multimember) independent agencies. *Id.* at 5–6. This is wrong for two reasons. First, the only provision challenged in *Myers* granted the Senate the power of advice and consent over the discharge of executive branch officials. This was clearly unconstitutional and anything that might be interpreted as commentary on the standards for presidential discharge of executive officials is no more than dicta. Second, much more recently than *Humphrey’s Executor*, the Court recognized that the test for whether a removal restriction is constitutional is whether it unduly impairs the President’s ability to perform the constitutional functions of the presidency, mainly the obligation to take care that the laws are faithfully executed. See generally *Morrison v. Olson*, 487 U.S. 654 (1988). The D.C. Circuit explicitly rejected this reasoning, observing that the question is not whether the President’s power has been diminished but whether the structure “departs from settled historical practice and threatens individual liberty.” *PHH Corp.*, 839 F.3d at 34. This is fundamentally inconsistent with the Supreme Court’s focus on diminution of a branch’s ability to carry out its assigned function in separation of powers cases not governed by a particular constitutional procedural or structural provision. The CFPB’s structure as a single-member independent agency might be unconstitutional, but not for the reasons given by the D.C. Circuit. Additionally, the court arguably overly downplayed the checking function of judicial review on the power of the Director of the CFPB. See *id.* at 35.

A final important element of the lower court assault on the administrative state is an attack on judicial deference to agency action. This should not be surprising. Deference to agency actions is one of the more controversial elements of administrative law. At the dawn of the administrative state, the Supreme Court conditioned its approval of agency adjudication on nondeferential review of jurisdictional and constitutional agency factual determinations, and it assumed that review of legal decisions would be *de novo* as well.<sup>87</sup> Barring substantial amendments to the APA, there is no realistic chance that deference to agencies will disappear altogether, but if deference to agencies were significantly reduced, the administrative law landscape could be fundamentally altered. On one hand, increasing judicial scrutiny of the substance of agency action would subject regulation to much closer scrutiny than ever before. This could put a great deal of agency action in areas of scientific uncertainty at risk, especially if courts put the burden on agencies to justify everything they do with strongly supportive evidence. On the other hand, in principle, agency procedure could become less important because deference is often connected to the formality of agency processes. With less deference, the formality of agency procedures would be less important. Of course, if courts strictly review agency compliance with the APA and other applicable procedural requirements, then agency procedural failures would be an independent basis for judicial invalidation of agency action.

The greatest sympathy for cutting back on deference is currently felt by conservative judges, just as conservative judges are more likely than liberal judges to be administrative state skeptics. For example, the most recent appointee to the Supreme Court, Justice Neil Gorsuch, openly questioned the wisdom and constitutionality of *Chevron* deference in a concurring opinion (to his own majority opinion) while he was on the Tenth Circuit.<sup>88</sup> This is ironic since the most controversial form of deference to agency action, *Chevron* deference, was viewed at its creation as part of a conservative effort to defer to deregulation by a conservative administration. Under current circumstances, reducing judicial deference to agency action could make it more difficult for the Trump administration to follow through on its promise to reduce what it characterizes as unnecessary, job-killing regulation. It remains

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87 See generally *Crowell v. Benson*, 285 U.S. 22 (1932). The common law of administrative law always recognized deferential review of routine agency factual conclusions arrived at pursuant to agency adjudicatory proceedings. The “some evidence” and “substantial evidence” tests were developed by courts as the appropriate standard for reviewing agency factual determinations. The codification of the substantial evidence standard in the APA was understood to require somewhat less deference than had been afforded by some courts, but the standard has always been understood to be as deferential as courts are when reviewing factual conclusions by juries. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

88 See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (“Not only is *Chevron*’s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well. . . . *Chevron* . . . appears instead to qualify as a violation of the separation of powers.”).



to be seen whether conservative antideference fever will continue under a conservative administration.

### *C. Legislative Reform*

Congress designed the administrative state and Congress has the power to alter it. For some years now, Republicans in Congress have been proposing significant reforms to administrative law, mainly procedural changes that would make it much more difficult for agencies to issue regulations. With the House, Senate, and presidency now in Republican hands, the prospects for passage of some of these reforms are much better than they were during the Obama administration. One of the proposed reforms would make a fundamental change to the administrative state—a requirement that transforms certain agency rules into proposals for legislation that cannot go into effect unless and until Congress passes a joint resolution approving the rule.<sup>89</sup> Otherwise, other than increasing procedural and substantive requirements for regulatory action, the proposed reforms would leave the structure of the administrative state largely unchanged.

The push for administrative reform in Congress is tempered by competing considerations and Congress's usual impediments to legislative change, most importantly supermajority requirements for beginning and ending debate in the Senate. To some in Congress, the administrative state may be Frankenstein's monster, with the minority party aiding the monster to evade capture and be tamed by the good doctor. However, it should really not be surprising that Congress is unlikely to make fundamental changes to the administrative state since the administrative state was created and is superintended by Congress. Today, powerful political forces support significant regulatory retreat and restructuring, but other forces push in the opposite direction. The federal government is blamed for many natural and man-made disasters, either for inadequate regulation in advance or an inadequate response *ex post*. As we have seen in the political controversy over the repeal of the Affordable Care Act, members of Congress rightly fear that voters would inflict heavy electoral punishment for dismantling favored programs. And assuming the scope of regulation is unlikely to change, the administrative state structure allows members of Congress to shift some measure of accountability for failures and overreach to the agencies. The administrative state may be the only practical and politically feasible way to structure most regulatory programs.

Further, members of Congress have strong independent interests in perpetuating the administrative state. It is a great source of patronage and a way to channel benefits to constituents. They use their oversight authority to encourage interested parties to provide political support. (Some would characterize this as extortion rather than encouragement.) That fruitful source of campaign contributions and other political support would evaporate if antiregulatory interests scored a decisive victory. This is why Adrian

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89 Joint resolutions are presented to the President for signature or veto.

Vermeule predicts that if a large-scale attack on the administrative state succeeded, Congress would find a way to reanimate it.<sup>90</sup>

Thus, it appears that Congress's long-term interests and tendencies point toward perpetuation of the regulatory state and the administrative state structure. Nonetheless, since they gained control over the House of Representatives during the Obama administration, Republicans in Congress have been pushing for major reforms. Even if they do not succeed, they certainly score points with constituents for trying. The question is whether now they will be punished if they do not follow through while they have control over Congress and the presidency. Perhaps the best outcome would be for Democrats in the Senate to invoke the filibuster to prevent reform—Republicans can preserve the benefits they enjoy from the existence of the administrative state and energize their supporters by blaming the opposition for their inability to enact actual reform.<sup>91</sup>

While there have been several bills introduced in both the House and the Senate, the discussion here focuses on the Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017,<sup>92</sup> and the Regulatory Accountability Act (RAA) of 2017,<sup>93</sup> because they are the most recent regulatory reform measures that have passed the House and have been sent to the Senate for its consideration. Most if not all of the provisions of these bills were considered by previous Congresses, with some passing the House more than once. The prospects for passage in the Senate are not very good because several Democrats would have to vote in favor of ending debate to overcome the sixty-vote requirement for that procedural step.

The REINS Act, which passed the House during the first week of the 115th Congress, contains the most radical provision: major rules (determined by the Office of Information and Regulatory Affairs (OIRA) to have \$100,000,000 annual effects on the economy or other significant effects on prices or competition) may take effect only after Congress enacts a joint resolution of approval (under rules providing for expedited consideration).<sup>94</sup> This would obviously be a significant change to the administrative state, transforming major rules from legally binding requirements into mere pro-

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90 See VERMEULE, *supra* note 65, at 218.

91 President Trump has thrown a monkey wrench into this possible strategy by demanding that the Republican leadership in the Senate abolish the supermajority requirements that give Democrats the power to block legislation. See Jordan Fabian, *Trump Calls on Senate to End Filibuster After Healthcare Defeat*, HILL (July 18, 2017), <http://thehill.com/business-a-lobbying/342485-trump-calls-on-senate-to-end-filibuster-after-healthcare-defeat>.

92 Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, § 3, 115th Cong. (2017).

93 Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

94 The President may put a major rule into effect for ninety days without a joint resolution in case of an emergency or an impact on criminal law enforcement, national security, or international trade. REINS Act of 2017, H.R. 26, § 3, 115th Cong. (2017). Further, the REINS Act would not affect the process for promulgating nonmajor rules or for taking nonrulemaking agency actions.

posals for legislation. Even with expedited consideration in Congress, the pace of rulemaking might slow down significantly as agencies craft their rules with Congress's approval in mind, and Congress might be reluctant to pass some rules, fearing the accountability. This provision of the REINS Act might also transform judicial review—would federal courts find it appropriate to apply APA judicial review standards to legislation passed by Congress?<sup>95</sup>

A more wide-ranging provision, RAA was passed by the House of Representatives on January 12, 2017.<sup>96</sup> This bill, which is under consideration in the Senate, combines a number of reforms that have been put forward by the House in recent years. Among its many provisions, the RAA would substantially increase the procedural and analytic requirements for rulemaking, prohibit courts from deferring to agency views on legal questions, require agencies, upon request from an interested party, to conduct a formal rulemaking hearing on major rules, require agencies to stay the effective date of major rules whenever judicial review of them is sought, and prohibit agencies from engaging in political advocacy in favor of their proposed rules. The RAA would also, for the first time, codify the requirement that rules be submitted to OIRA for centralized review and would, for certain rules, make cost-benefit analysis mandatory and subject to judicial review.

Unlike the REINS Act, the RAA would not fundamentally change the structure of the administrative state. Its most significant proposed structural change would be to codify centralized review of agency rules by OIRA, taking that process out of the complete control of the President.<sup>97</sup> It would also slow down the rulemaking process significantly. By increasing procedural and analytic requirements, agencies would be forced to devote significantly greater resources to each rulemaking. Absent the extremely unlikely event of substantial budgetary increases for agencies, this would reduce the number of rules each agency could produce, and each rule would take longer to promulgate, but it would not alter the structure of the administrative state in any fundamental way.

The political forces behind the REINS Act and the RAA include administrative state skeptics, who view the administrative state as inconsistent with

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95 While the constitutionality of this provision has been questioned, because joint resolutions are presented to the President for signature or veto, this procedure is consistent with the Constitution's process for enacting legislation. In my view, it does not run afoul of general separation of powers principles either, because what it really does is eliminate agency power to make major rules. The only arguable constitutional violation is the President's power to unilaterally make major rules effective for ninety days. That may appear to grant the President the power to make laws unilaterally. However, even this provision is likely permissible because it is best viewed as a limited rulemaking authority. If an agency under current law can constitutionally exercise delegated power to make permanent rules, it is difficult to see what would be wrong with allowing an agency, with the President's approval, to make temporary rules.

96 Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

97 Currently, OIRA review of proposed regulations is a creature of executive orders, which the President is free to alter or rescind at any time.

the Constitution and the instrument of unnecessary, economically damaging, regulation. But the administrative state is also the instrument Congress uses to satisfy its various constituencies, making it highly unlikely that Congress will sign on to the complete deconstruction of the administrative state and the devolution of all administrative power to the President.

#### *D. Reform in the Executive Branch*

The executive branch is the situs of the administrative state and thus has not historically been behind structural reform efforts, except those aimed at centralizing control over regulatory policy and programs. Presidents have resisted Congress's efforts to insulate agencies from presidential control, including restrictions on the President's power to direct and discharge agency heads, but successes in these efforts have been few and far between. Congress continues to empower independent agencies to exercise control over important policy matters and the federal courts have made only marginal inroads on Congress's power to insulate officials from presidential control.

The most significant and successful reform to the administrative state in the last half century came from the executive branch: the establishment of centralized review of agency rulemaking. In a history that is familiar to all students of American administrative law, in 1981 President Ronald Reagan issued an executive order requiring agencies to submit major proposed rules to the Office of Management and Budget (OMB) for review, and to include a cost-benefit analysis in the submission even if the agency's enabling act did not require that agency rules be cost-effective.<sup>98</sup> This practice has been continued, with periodic refinements, by all subsequent administrations. This, in combination with more active presidential involvement in the formulation and execution of policy, has resulted in a sense that the President is more firmly in control of the administrative state than in previous decades.<sup>99</sup>

The Reagan administration promised a substantive attack on the administrative state in the form of deregulation. The Trump administration professes something similar. President Trump's former staffer and close advisor Steve Bannon promised a "deconstruction of the administrative state."<sup>100</sup> This is not a promise of structural alteration but rather a pledge of deregulation. Bannon explained that by appointing regulatory skeptics to key posts, such as Scott Pruitt as head of the EPA and Tom Price as head of Health and Human Services, the Trump administration's prime directive will be to reduce federal regulatory burdens on the economy. President Trump's appointee to head OIRA, Neomi Rao, is also an administrative state skeptic,

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98 See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

99 See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

100 Marc Fisher, *Behind the Political Lexicon of the Trump White House*, WASH. POST (Mar. 10, 2017), [https://www.washingtonpost.com/politics/the-political-lexicon-of-a-billionaire-populist/2017/03/09/4d4c2686-ff86-11e6-8f41-ea6ed597e4ca\\_story.html?utm\\_term=.82847f15f6a7](https://www.washingtonpost.com/politics/the-political-lexicon-of-a-billionaire-populist/2017/03/09/4d4c2686-ff86-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.82847f15f6a7).

and she appears to have embarked on a plan to significantly reduce the volume of agency rulemaking. And President Trump's appointee as interim director of the CFPB, Mick Mulvaney, once called that agency a "sick, sad" joke.<sup>101</sup> However, at this point, there is no hint of a structural deconstruction.

### III. THE ACADEMY

The decades-long scholarly attack on the administrative state has reached a new crescendo since the publication of Philip Hamburger's book *Is Administrative Law Unlawful?*<sup>102</sup> But there have always been administrative state skeptics in the academy creating a constant stream of scholarship that questions the administrative state's structural fundamentals. While, as discussed above, the Supreme Court has not shown a likelihood of accepting these critiques, the hopes and dreams of administrative state skeptics are kept alive by a political and scholarly commitment to the view that the structure of the administrative state is contrary to the Constitution's principle of separation of powers and that Congress has vastly exceeded the limited powers granted to it by the Constitution.

There was a flurry of scholarship in the early- to mid-twentieth century concerning the proper structure of the administrative state.<sup>103</sup> Although it is impossible in this format to present a comprehensive view of this scholarship, it is safe to say that there was a great deal of theoretical skepticism about agency policymaking and adjudication coupled with pragmatic acceptance of the role that agencies were playing in the early administrative state. Some scholars clearly felt queasy about the consistency of the structure of the administrative state with the Constitution's requirement of separation of powers and the potential for abuse presented by administrative power at the same time that they struggled to construct a theory to justify their acceptance of the transformation of the government that they were witnessing. Perhaps they saw the growth of the administrative state as a necessary evil in light of the exigencies confronting twentieth-century government.

Professor James Hart contributed significantly to the analysis of administrative law in the early twentieth century. Hart taught political science at Michigan, Johns Hopkins, and Virginia. His Johns Hopkins political science Ph.D. dissertation, which has been characterized as the "first general work

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101 Renae Merle, *Dueling Officials Spend Chaotic Day Vying to Lead Federal Consumer Watchdog*, WASH. POST (Nov. 27, 2017), [https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d\\_story.html?utm\\_term=.6267bb56dcab](https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d_story.html?utm_term=.6267bb56dcab).

102 See generally HAMBURGER, *supra* note 2.

103 James Landis's book, *The Administrative Process*, presented a full-throated defense of the administrative state, which Landis was heavily involved in constructing. He argued that delegation of discretion to agencies and the combination of legislative, adjudicatory, and executive functions within agencies were important positive steps toward modernizing government. See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

dealing with national administrative legislation,"<sup>104</sup> was published as a book entitled *The Ordinance Making Powers of the President of the United States*.<sup>105</sup> In his preface, among others, he thanked Johns Hopkins "President Goodnow" and "Professor Frankfurter, of the Harvard Law School."<sup>106</sup> Frank Goodnow was one of the first professors of administrative law in the United States, and before he was a Supreme Court Justice, Felix Frankfurter was a well-known advocate for New Deal policies. Hart's dissertation grappled with the problem of delegation of discretionary authority by Congress to the President, acknowledging constitutional doubts. In the end, however, he came to a very modern sounding conclusion:

[T]he fortunate use of broad generalizations in the Constitution introduces a flexibility which makes the instrument adaptable to the needs of successive generations. . . . [T]he legislative powers granted to Congress include the power, as being a necessary and proper means of carrying them into execution, to delegate to the Executive the function of issuing ordinances which concretize the legislative enactments.<sup>107</sup>

In other words, as Hart later explained in an essay in less dated language, delegated rulemaking authority is, within limits, consistent with the Constitution's requirement of separation of powers.<sup>108</sup>

Another work that illustrates the concerns and yet acceptance of the administrative state in the early years is a book based on four lectures on administrative law delivered by Roscoe Pound in 1940.<sup>109</sup> On the one hand, Pound expressed concern, in language picked up by Hamburger, that the administrative state contains echoes of Royal Proclamations, the Star Chamber, and "[t]he movement away from . . . judicial justice administered in

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104 JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 5 (1927).

105 See generally JAMES HART, *THE ORDINANCE-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES* (1925).

106 *Id.* at vii.

107 *Id.* at 144.

108 See James Hart, *Some Aspects of Delegated Rule-Making*, 25 VA. L. REV. 810, 823 (1939). Hart conducted research on this issue for the President's Committee on Administrative Management. See generally James Hart, *The Exercise of Rule Making Power*, in 5 THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, *STUDIES ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 1-45 (1937). Comer's conclusions on the proper scope of Congress's delegated power were similar to Hart's. Although Comer based his entire analysis on the premise that separation of powers "[i]n its absolute application . . . would have precluded any exercise of delegated legislative power by the Executive," COMER, *supra* note 104, at 115, after an exhaustive review of the early caselaw and a thorough consideration of the scope of delegated power, Comer concluded that:

Whatever may be the exact limits of the scope of delegable discretion, one derives from the reading of such decided cases and from a study of the practice under statutory law the conclusion that the Executive has a rather large degree of freedom in carrying out the purposes of Congress.

*Id.* at 131 (footnotes omitted).

109 See ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE* (1942).

courts to executive justice administered in administrative tribunals or by administrative officers.”<sup>110</sup> Pound was concerned that administrative tribunals could not provide the due process guarantees for which the courts of justice were designed.<sup>111</sup> In perhaps his most critical passage, Pound observed that:

The polity proposed by some, in which there is to be a fourth department, the administrative, in which full legislative, administrative, and judicial power is to be concentrated, is a reversion to the seventeenth and eighteenth-century type of absolute government . . . the type of government in colonial America which led to the Revolution.<sup>112</sup>

On the other hand, rather than condemn the administrative state wholesale, Pound’s work as a whole ends up with a rather moderate insistence on effective judicial review as a necessary check on administrative agencies.<sup>113</sup> Perhaps this is due to the realization that the political forces behind the administrative state would not retreat even in the face of a withering academic critique and that a more moderate proposal was more likely to at least push the matter in the right direction. In any event, Pound did not conclude his analysis with a full-throated attack on the structure of the administrative state.

J. Roland Pennock, a longtime political science professor at Swarthmore College, published an important critique of the administrative state in 1941, focusing largely on the delegation of authority to agencies but with some attention to the problem of the combination of functions within administrative agencies.<sup>114</sup> Pennock, echoing concerns expressed by Ernst Freund more than a decade earlier,<sup>115</sup> observed that “it is . . . clear that the combination of the various powers into one agency without the proper safeguards may be very dangerous indeed.”<sup>116</sup> Regarding the rulemaking power, Pennock thought that the United States Congress tended to include more detail in statutes than European legislatures, which in his view ameliorated the concern over administrative discretion.<sup>117</sup> Nevertheless, he expressed the concern that administrative rulemaking is less democratic than legislation in Congress because agencies work out of the public eye, “are likely to be much

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110 *Id.* at 37.

111 There were proposals in the early twentieth century to create an administrative court staffed by Article III judges. *See generally* Robert M. Cooper, *The Proposed United States Administrative Court*, 35 MICH. L. REV. 193 (1936) (discussing constitutional doubts about adjudication in administrative agencies and proposals to transfer administrative adjudication to a new Article III administrative court).

112 POUND, *supra* note 109, at 54–55.

113 *See id.* at 73–84.

114 *See generally* J. ROLAND PENNOCK, ADMINISTRATION AND THE RULE OF LAW (1941).

115 *See generally* ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY (1928).

116 PENNOCK, *supra* note 114, at 33.

117 *See id.* at 38.

less sensitive to public opinion than are elected members of a legislature,” and are “too easily influenced by certain specially interested groups.”<sup>118</sup>

However, in terms similar to those expressed by Hart and Pound, Pennock concluded that while administrative discretion is dangerous, there are adequate safeguards in place or available to deal with any danger that arises. In particular, Pennock cited the competence and integrity of administrative officials, the nascent (at the time) requirement of notice and comment before the promulgation of rules, publicity of the rules once promulgated, and judicial review.<sup>119</sup> Pennock concluded that in ratemaking and licensing, administrative officials may have too much unchecked power and judicial review may not always provide an effective check. He also recommended adoption of a code of administrative procedure to regularize the notice and participation rights of the public and the subjects of regulation. But overall, Pennock was far from a crusader against the development and expansion of the administrative state.

We can go all the way back to 1912 to find a general statement of the principles embodied in most of the early scholarly work on administrative law.<sup>120</sup> In a 1912 address to a law club at the University of Pennsylvania published the following year, Jasper Yeates Brinton, a 1904 graduate of the University of Pennsylvania Law School and Judge of the Mixed Courts of Egypt, predicted that increased policy complexity would lead to a dramatic increase in the importance of administrative agencies. He advocated judicial deference to agency expertise and considered whether separation of powers concerns would prevent Congress from expanding their rulemaking, enforcement, and adjudicatory functions. His conclusion? “[T]he new methods which experience shall compel us to adopt for the solution of the vast and as yet almost unrealized problems of the future need fear no jealous hindrance from the federal courts, and will find no straight-jacket in the Constitution.”<sup>121</sup>

The most strident anti-administrative state critique published in the early twentieth century was a 1932 volume by James Beck entitled *Our Wonderland of Bureaucracy*.<sup>122</sup> Beck, who served as Solicitor General of the United States under Presidents Warren G. Harding and Woodrow Wilson, and as member of Congress from Pennsylvania for several terms, was an active opponent of New Deal programs and a prominent participant in the activities of the American Liberty League, an organization dedicated to fighting the

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118 *Id.* at 47.

119 *Id.* at 49–60, 147.

120 See Jasper Yeates Brinton, *Some Powers and Problems of the Federal Administrative*, 61 U. PA. L. REV. 135, 137 (1913).

121 *Id.* at 158.

122 JAMES M. BECK, *OUR WONDERLAND OF BUREAUCRACY* (1932). In her recent article *Foreword: 1930s Redux: The Administrative State Under Siege*, Gillian Metzger reports that a great deal of this book may have been written by another active anti-New Deal lawyer, Ollie Roscoe McGuire. Metzger, *supra* note 54, at 57–58.



expansion of regulation and the administrative state.<sup>123</sup> Beck's book was a broadside against the growth of the federal bureaucracy and the size and reach of the federal government. Beck's biggest target was the growth in federal government spending, which he put down to a misreading of the Constitution's provision empowering Congress to provide for the "general welfare of the United States."<sup>124</sup> In Beck's view, the "general welfare" clause was meant to prevent Congress from narrowly targeting funds, not to provide a license to expend funds beyond those provided for in Congress's enumerated powers.<sup>125</sup>

Interestingly, Beck endorsed the concept of a living constitution, stating that "[t]he Constitution is something more than a written and definitive contract. It is a living organism, susceptible of adaptation and, therefore, of increasing growth, and its vitality depends upon its correspondence with the necessities and spiritual tendencies of the American people."<sup>126</sup> Even in his chapter on "Bureaucracy and the Constitution," most of Beck's complaints are substantive, not structural, and his structural complaints were not aimed at the central features of the administrative state except for a wholesale condemnation of the "breaking down of the barriers that once imperfectly marked the different functions of the Executive, Legislative and Judiciary."<sup>127</sup> He unleashed his greatest wrath on Prohibition, attacking "the crowning atrocity of the Eighteenth Amendment, which invades individual liberty in a manner, at which Washington and Franklin would have stood aghast and which, in this respect, relegates the once proudly conscious States to the ignominious position of being mere police provinces."<sup>128</sup>

Despite Beck's attack and the misgivings expressed by others, there was no consensus among early twentieth century scholars that delegated discretion to administrative agencies and other aspects of the administrative state violated the Constitution's requirement of separation of powers.<sup>129</sup> There

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123 Future Supreme Court Justice Robert Jackson, while serving as Assistant General Counsel in the Treasury Department and Special Counsel to the Securities and Exchange Commission during the Roosevelt administration, attacked Beck's Liberty League activities in a speech to lawyers in Buffalo, New York, in 1935. See Robert H. Jackson, *The Liberty League and the Constitution*, Address to the Buffalo Lawyers Club (Dec. 14, 1935).

124 BECK, *supra* note 122, at 21–25 (discussing U.S. CONST. art. I, § 8, cl. 1).

125 *Id.* at 24.

126 *Id.* at 243.

127 *Id.* at 244–45. More specifically, Beck attacked the Tariff Commission as unconstitutionally exercising Congress's power to tax, the combination of prosecutorial and judicial functions in agencies, and the creation and use of government corporations to carry out government functions. *Id.* at 128–47, 165–77, 194–96. Regarding government corporations, Beck states that they have "dissipated responsibility, and permitted employees of the United States under the mask of a state charter to avoid all reasonable administrative regulations, and impose upon the taxpayer an intolerable burden of extravagant expenditures, often increased by gross corruption." *Id.* at 128.

128 *Id.* at 245.

129 As Gillian Metzger demonstrates, the political attack on the expansion of federal regulatory power and the structure of the administrative state was much stronger than the scholarly attack. See Metzger, *supra* note 54, at 52–62.

was consistent concern over excessive delegation tempered by acknowledgment that the line between permissible and excessive delegation was too fuzzy to form the basis of a robust, administrable legal doctrine. There was more agreement on the evil of concentration of all three government functions within administrative agencies. Many commentators expressed the view that the typical combination of functions within agencies was unconstitutional and the source of great potential for arbitrary deprivation of liberty.<sup>130</sup> However, there are numerous additional early twentieth century works discussing the contours and expansion of the administrative state, the vast majority of which follow this pattern of expressing concerns while finding existing or potential controls sufficient to combat the danger inherent in the expansion of executive power. In short, the real scholarly assault on the administrative state came later, when scholars, perhaps concerned over the expansion of administrative power in the 1960s and 1970s, attacked the administrative state with a vigor not seen before.

The best concise guide to more recent attacks on the administrative state is contained in Gary Lawson's 1994 article, *The Rise and Rise of the Administrative State*.<sup>131</sup> In this article, Lawson sketches five infirmities of the administrative state: it expands the power of the federal government beyond constitutional limits; it violates the nondelegation doctrine's limitation on the ability of Congress to delegate discretionary power to the executive branch; it conflicts with the Constitution's vesting of all executive power in the President by fragmenting that power and insulating executive officials from complete presidential control; it destroys judicial independence by allocating adjudicatory power to non-Article III adjudicators; and it violates separation of powers by investing agencies with adjudicatory, executive, and legislative powers. There is broad agreement on these critiques among administrative state skeptics, and they provide an undercurrent of uncertainty over the status of administrative agencies.

Lawson's third critique, that Congress has unconstitutionally insulated agencies from complete presidential control (known in recent decades as the "unitary executive theory"), is probably the most consistent complaint of administrative state skeptics.<sup>132</sup> Numerous scholars promoted what became

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130 See O.R. McGuire, *Administrative Lawmaking*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 83 (1936) (expressing concern over the combination of functions within administrative agencies and the tendency of politically appointed administrative officials to exercise policymaking power in an arbitrary manner). McGuire was the Chair of the American Bar Association's committee studying the structure and powers of the administrative state. See WARD E. LATTIN, *FEDERAL ADMINISTRATIVE REGULATORY AGENCIES AND THE DOCTRINE OF THE SEPARATION OF POWERS* 27 (1938); cf. *id.* (arguing that the combination of functions within administrative agencies presents an unacceptable potential for tyranny). McGuire's essays were collected in a volume published entitled *Americans On Guard*. O.R. MCGUIRE, *AMERICANS ON GUARD* (Richard Harwood-Staderman ed., 1942).

131 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

132 Earlier critiques of independent agencies focused more on the regulatory merits than on constitutional questions concerning structure. See, e.g., MARVER H. BERNSTEIN,

known as the “unitary executive theory,” which views as unconstitutional any restriction on complete presidential control of the execution of the law.<sup>133</sup> The unitary executive theory’s starting point is the first sentence in Article II of the Constitution, which provides that “[t]he executive Power shall be vested in a President of the United States.”<sup>134</sup> Two aspects of this sentence are important to the unitary executive theorists. First, as Justice Scalia put it, the Constitution does not say “some” of the executive power, and thus means that “all” of that power is vested exclusively in the President.<sup>135</sup> Second, the vesting of the executive power in the President is unqualified. By contrast, the first sentence of Article I vests “[a]ll legislative Powers *herein granted*” in Congress.<sup>136</sup> Coupled with the Constitution’s imposition on the President of the duty to “take Care that the Laws be faithfully executed,”<sup>137</sup> the absence of the “herein granted” language in Article II is viewed by unitary executive adherents as textual proof that the Constitution vests all powers of an executive nature in the single personage of the President.<sup>138</sup> In their view, any effort by Congress to insulate the execution of the law from complete presidential control is thus contrary to the Constitution’s text.<sup>139</sup>

As a legal matter, adoption of the unitary executive theory would not limit the reach of federal regulation, and the President could theoretically grant significant discretion to other Officers of the United States, thus preserving the ability of agencies to function free from complete presidential control. There is absolutely no reason to believe that any of the substantive functions of agencies currently insulated from complete presidential control could not be legally performed by agencies under such control. But politically, things could change dramatically. Although the publicly stated reasons for the independence of independent agencies is to allow agency expertise to control and to keep them out of politics, the truth is that many of the independent agencies are among the most political in government. It is well known that one of the virtues of independent agencies in Congress’s eyes is that they are subject to great influence, if not control, by the members of Congress most keenly interested in their work, although congressional influence over independent agencies is much less than presidential influence over

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REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955) (criticizing independent agencies for lacking coherent regulatory plans and for being under the influence of the special interests they were supposed to be regulating).

133 See Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197.

134 U.S. CONST. art II, § 1.

135 See *Morrison v. Olson*, 487 U.S. 654, 697–98, 705 (Scalia, J., dissenting).

136 U.S. CONST. art I, § 1 (emphasis added).

137 U.S. CONST. art. II, § 3.

138 See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–76 (1992).

139 Gary Lawson argues that while Congress may legislatively attempt to delegate power directly to a presidential subordinate, any action taken by an executive official against the President’s orders is void. Lawson, *supra* note 131, at 1243.

nonindependent agencies.<sup>140</sup> If all agencies were subject to complete presidential control, Congress might be much more reluctant to grant sweeping regulatory powers to agencies and the scope of federal regulation could contract significantly.

Professors Sunstein and Vermeule refer to the collection of arguments attacking the administrative state as “the New Coke.”<sup>141</sup> Their view is that, contrary to adherents’ protestations, the New Coke is built on contemporary concerns over the abuse of executive power and not on an originalist separation of powers jurisprudence. In their view, the center is holding against the attacks on the administrative state, but they recognize that Justices Thomas and Alito have hinted, in their opinions, that they accept some of the premises of the attack. With the appointment of Justice Neil Gorsuch and the real possibility that President Trump will have one or more additional Supreme Court seats to fill, the assault on the administrative state may gain traction beyond its current apparent potential.

Although voiced less frequently and with less vehemence than the unitary executive theory, another consistent complaint raised by scholars among administrative state skeptics is the combination of functions within administrative agencies. Skeptics argue that combining rulemaking, adjudication, and enforcement functions into a single entity violates principles of separation of powers. One has to be careful to pitch this argument correctly lest it degenerate into the circular claim that it violates separation of powers for agencies to exercise non–Article II powers. Almost no one doubts that the Constitution confines each branch to the power allocated to it in the Constitution. Agencies can no more exercise Congress’s legislative power than fed-

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140 For a recent account of how Congress influences one agency, see SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* (2017). For more general comments on the susceptibility of independent agencies to congressional control or influence, see Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006). Although members of Congress can exert influence over independent agencies, that influence is not comparable to the control that the President can exert over nonindependent agencies. Recent events illustrate this. The Environmental Protection Agency’s notice of proposed rulemaking aiming to rescind the EPA’s Clean Power Plant rules cites one of President Trump’s executive orders as the reason the EPA decided to look at the matter. See *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 84 Fed. Reg. 48,035 (proposed Oct. 16, 2017). By contrast, President Trump has no way to enforce his recent suggestion that the FCC revoke NBC’s broadcast license because he does not approve of the network’s news coverage. See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 9:55 AM), <https://twitter.com/realDonaldTrump/status/918112884630093825> (“With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!”). Even in the unlikely event that influential members of Congress expressed support for the President’s suggestion, it is difficult to imagine the FCC taking such a step, especially since it would involve revoking the licenses of dozens of television and radio stations that carry the network’s programming.

141 Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41.

eral courts can execute the law pursuant to Article II. The attack here is somewhat more normative, that combining these functions into a single entity presents an unacceptable risk of arbitrary decisionmaking because the checks on overreach provided by separating the legislative, executive, and adjudicatory functions are absent. Except for those few hyperformalists who believe that all agency rulemaking and adjudication violates separation of powers by encroaching on the powers reserved to the Congress and the federal courts, the argument for separation of functions is based on the concern that agencies are insufficiently checked by judicial review and presidential supervision.

Sunstein and Vermeule insist that the views of these critics are as unconnected to originalist or textualist views of the Constitution as substantive due process decisions such as *Roe v. Wade*.<sup>142</sup> The problem is not that agencies are actually exercising Article I powers when they make rules or Article III powers when they adjudicate, but that allowing the combination of enforcement, rulemaking, and adjudication in a single agency is an inferior form of agency organization because it eliminates potential checks on arbitrary action by agencies. I agree that originalist arguments for the dismantling of the administrative state are unconvincing, but many if not most administrative state skeptics view their project as fundamentally different from that of adherents to the notion of the “living constitution.” Administrative state skeptics would recoil in horror from the suggestion that their reasoning is a close cousin of the jurisprudence that produced the right to abortion or same-sex marriage. It is one thing for them to be incorrect in their reading of the Constitution’s text and history; it is quite another for them to be deluded into importing their normative views into a false originalist narrative. But the critics must be careful because Sunstein and Vermeule’s characterization is correct as to many of the critics’ claims, including the argument that combination of functions within a single agency constitutes an actual violation of separation of powers. When an agency adjudicates or makes a rule, it is executing the law, not legislating or exercising the judicial power of the United States.

Currently, Philip Hamburger’s dazzling book, *Is Administrative Law Unlawful?*, has invigorated the assault on the administrative state to an extent not seen since the early 1980s. Hamburger’s comprehensive volume attacks the administrative state root and branch in an almost irresistibly persuasive style. The major contribution of this work, in terms reminiscent of those employed by Roscoe Pound a century before, is to link key features of the administrative state to despotic governmental structures that were vanquished long ago in Great Britain and rejected by the framers of the United States Constitution.<sup>143</sup> While mainstream scholars have answered

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142 410 U.S. 113 (1973).

143 See HAMBURGER, *supra* note 2, at 25 (discussing Pound’s characterization of administrative law as “absolute power”).

Hamburger's question with a resounding "no,"<sup>144</sup> the world of administrative state skeptics has found a grounding to refute, once and for all, the charge that their administrative state skepticism is born of conservative politics and not true concern for the Constitution.

Hamburger's book is much too long and complex to address completely here, but I will try to take some of Hamburger's main points and offer reasons to be skeptical of the soundness of his argument. At the risk of serious distortion, Hamburger's main points can be stated as follows: (1) The nondelegation doctrine is required by the Constitution's structural provisions and is violated every time the executive branch exercises "will" as Hamburger puts it. Hamburger defines the exercise of "will" as the choice among various policies; the exercise of "will" is reserved to the legislature, i.e., Congress. The executive branch's only function is to obey instructions authored by the legislative branch. While this may require judgment, it cannot constitutionally require the exercise of will. (2) Adjudication in administrative agencies is unconstitutional on two separate grounds. First, it violates the Constitution's assignment of the judicial power to the judicial branch of government. Second, it violates due process. In Hamburger's view, only a properly appointed judge is capable of satisfying the requirements of due process. (3) Deference by judges to administrative agencies, whether on law, fact, or policy, is unconstitutional because it allows the government, in essence, to be a judge in its own case.<sup>145</sup>

It is impossible to fully understand Hamburger's critique without getting a sense of its historical roots. In a nutshell, and again at the risk of serious distortion, Hamburger finds parallels to each of the defective features of the administrative state in pre-Constitutional practices that were rejected in England as tyrannical and contrary to the rule of law and other fundamental principles upon which the Anglo-American liberal legal state is built. To Hamburger, the exercise of legislative will by an agency is contrary to the basic constitutional right that was fought for over centuries to be governed only by law made in Parliament. He likens administrative pronouncements to Royal Proclamations, which were rejected as appropriate sources of law in England in the sixteenth century, and to the actions of the infamous Star Chamber, which was abolished in 1641. Hamburger characterizes all exercises of "will" outside the legislative branch as an exercise of "absolute power" which he defines as "extralegal," "supralegal" and "consolidated."<sup>146</sup>

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144 See, e.g., Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra* note 2).

145 See generally HAMBURGER, *supra* note 2. Hamburger makes two related points about the administrative state that I do not address in this Article: that administrative adjudication is unconstitutional because it deprives litigants of their Seventh Amendment right to trial by jury in actions at common law, and that administrative enforcement processes are constitutionally defective because they do not provide the subjects of enforcement with the safeguards of the criminal process.

146 *Id.* at 21–30 (providing an introduction to his general framework).

By “extralegal,” Hamburger means simply any exercise of legislative will or adjudicatory power outside of the legislature or courts. By “supralegal,” Hamburger means “above the law,” which he says is true of administrative edicts because courts defer to them. By “consolidated,” he means edicts that are produced by entities that combine multiple government functions—i.e., legislative, executive, and judicial—which is how he views administrative agencies. Absolute power, then, is the power that is conventionally exercised by today’s administrative agencies. The phrase “absolute power,” which Hamburger admits may sound “harsh,”<sup>147</sup> was employed by early twentieth-century administrative law scholars to depict what the developing body of administrative law needed to prevent. In Hamburger’s usage, it does not add anything to the analysis. Rather, it is designed to persuade the reader by evoking a negative emotional reaction. When he defines the elements of absolute power, it becomes clear that he is simply using the phrase as an evocative shorthand for perceived constitutional shortcomings.

Similar to Hamburger’s attack on agencies for exercising legislative will, Hamburger attacks agency adjudication as contrary to the historical and constitutional rejection of adjudication by officers under the influence and even control of the executive branch of government, or by the Crown. Historically, because the Crown knew that its edicts would not be enforced by the courts of law, extralegal courts such as the Star Chamber were established to create an enforcement mechanism. These entities were controversial over a long period of time, and Hamburger reports that after the abolition of the Star Chamber in 1641, the only way that other entities such as the Chancery Courts could continue to function was to be realigned as actual courts of law.<sup>148</sup>

The problem of consolidated power has been discussed above and is addressed further below.

Interestingly, Hamburger does not directly address the unitary executive theory or the constitutionality of legislation restricting the President’s power to direct and control administrative agencies. Of course, one of Hamburger’s primary targets is the abuse of executive power, which he views as usurping powers reserved to Congress and the federal courts, but he does not discuss the President’s power to direct the legitimate activities of the

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147 *Id.* at 25.

148 Although Hamburger draws greatly from Roscoe Pound’s lectures on administrative law, Hamburger disagrees with Pound’s conclusion that adjudication in the executive branch, apparently with deference to agency legal determinations, “is perfectly sound and no real infringement of the constitutional separation of powers.” POUND, *supra* note 109, at 34. Pound would not countenance administrative adjudication without judicial review. *See id.* at 65, 84. And in a later section of the book, it is unclear whether Pound really meant to endorse deference to agency legal decisions. *See id.* at 84 (advocating a simple judicial review procedure under which the court would determine, *inter alia*, “whether the administrative agency has applied according to law the standard committed to it by statute or has applied a different one”).

executive branch<sup>149</sup> except to say that the President has the power to subdelegate the executive power due to the absence of the word “all” in the first sentence of Article II of the Constitution.<sup>150</sup> This is surprising given that the independence of independent agencies is one of the pillars of the administrative state. Perhaps Hamburger is so concerned about presidential overreach that he does not want to encourage even greater unilateral presidential power than already exists in the administrative state. Although questions concerning presidential power have been subject to scholarly scrutiny as long as there has been administrative law scholarship, criticisms of unilateral presidential action reached new heights during the Obama administration, which makes Hamburger’s silence on this issue in a book written during that administration even more curious.

Lawson, Hamburger, and others present a comprehensive alternative vision of the structure of the United States government to the one that has developed over the more than 225 years of the American republic. Under Lawson and others’ views, all Officers of the United States would be completely subject to direction, discipline, and removal by the President.<sup>151</sup> Both Lawson and Hamburger agree that administrative rulemaking should be limited to technical matters not involving competing policy choices. Whenever due process requires a hearing, that hearing would be provided by an Article III judge who would not defer to agency views on facts, law, or policy. Where otherwise allowed, agencies could not perform rulemaking, enforcement and adjudicatory functions within a single entity. Rather, each function would be performed only by separate entities, perhaps with a central pool of administrative judges for all agencies. And, perhaps most importantly, the scope of federal regulation would be vastly reduced, with states responsible for the lion’s share of regulation aimed at protecting or advancing the general welfare.

Congress could, if it chose, legislate these changes into existence. There is no constitutional impediment to restructuring the administrative state according to the prescriptions of administrative state skeptics. Politically, however, for all of the reasons that Congress brought the administrative state into existence in its current form, this is exceedingly unlikely to occur unless the Supreme Court forces the matter by taking the almost as unlikely step of declaring the current structure unconstitutional. As I discuss below, there is so little support in the Constitution or constitutional law for the views of the

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149 At a superficial level, it may appear that Hamburger’s concerns over absolute and consolidated power in the executive branch would lead him to reject the unitary executive theory. However, there is nothing inconsistent between Hamburger’s proposed limitations on the powers of the executive branch and recognizing unlimited presidential power to direct all of the *legitimate* activities of the executive branch. In fact, insofar as the unitary executive theory is based upon the concern that independent agencies are insufficiently politically accountable, presidential control is something that Hamburger should favor.

150 See HAMBURGER, *supra* note 2, at 387. The presence of the word “all” in the first sentence of Article I of the Constitution means, according to Hamburger, that Congress may not subdelegate its legislative power. See *id.*

151 See Lawson, *supra* note 131.



administrative state skeptics that, in short, this is not going to happen anytime in the foreseeable future.

Although I never thought I would use the word “moderate” to describe Gary Lawson’s attack on the administrative state, his is, in many ways, more moderate than Hamburger’s. Lawson’s complaints have become the standard points of attack on the expansion and structure of the federal regulatory state.<sup>152</sup> I do not intend to rehash the arguments concerning whether his vision is more faithful to the Constitution’s text, meaning, and history than the direction the federal government has taken for at least the past century. Even if he is correct, however, it is doubtful that the vague strictures of that document should govern Congress’s ability to react to the changing social, political, economic, and diplomatic forces that have combined to influence Congress’s creation and perpetuation of the administrative state.

The expansion of federal power depends on the Court’s approval of Congress’s power to regulate intrastate economic activities with interstate effects. The Court has carefully limited this expansion to economic activity so the federal government cannot displace more of the states’ traditional police powers than necessary to protect the national economy.<sup>153</sup> While it is imaginable, it is extremely unlikely that the Supreme Court will reverse itself and declare that Congress’s power to regulate interstate commerce does not include the power to regulate intrastate economic activities with interstate effects. And rightly so. Not only would a contrary holding require wholesale restrictions of federal regulatory power and restructuring of the administrative state, it would unnecessarily place significant portions of the national economy at the mercy of state legislatures with potentially parochial interests.

In his review of Hamburger’s book, which makes many of the points made here, Adrian Vermeule points out an irony that applies to Lawson’s critique as well.<sup>154</sup> Hamburger and Lawson both complain that delegation of discretionary authority to agencies reduces democratic control of government. Hamburger goes further than Lawson and complains bitterly that the entire structure of the administrative state allows lawmaking without democratic accountability.<sup>155</sup> As Vermeule explains, it is Congress, the most democratically accountable branch of the federal government, that created the structure and decided to delegate power to agencies.<sup>156</sup> Vermeule opines that if the administrative state were demolished, Congress would try its best to resurrect it in a constitutionally acceptable form.<sup>157</sup>

In my view, there is something even more troubling about this aspect of Hamburger’s critique. One of Hamburger’s powerful rhetorical points is to trace the establishment of the administrative state as we now know it to the

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152 *Id.*

153 *See generally* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

154 *See generally* Vermeule, *supra* note 144.

155 *See* HAMBURGER, *supra* note 2, at 31.

156 *See* Vermeule, *supra* note 144, at 1557.

157 *See* VERMEULE, *supra* note 65, at 218.

expansion of the franchise in the early twentieth century. In his view, politicians' reaction to the realization of greater democracy in the United States was to insulate important policy decisions from political influence.<sup>158</sup> This may sound good if you say it fast, but it is completely implausible to imagine that the New Dealers, while they were creating welfare programs like Social Security, pumping up the economy with infrastructure programs like the Work Products Administration, and crafting regulations to shore up financial markets, were also secretly conspiring to place government policy beyond the control of the newly enfranchised, more diverse, electorate.<sup>159</sup> This is a conspiracy theory for Twitter, not for serious academic work.<sup>160</sup>

Further, even if there were some truth to this wacky idea, it would be completely perverse to call on the federal courts to cure this supposed problem. Suppose the Supreme Court agreed with Hamburger's complaint about "extralegal absolute power," that it unconstitutionally takes power from the legislature and places it in the hands of faceless bureaucrats.<sup>161</sup> What would happen then? Recall that the courts are (purposely) the least democratically accountable branch of the United States government. Yet, out of concern for democracy, Hamburger calls on the courts to severely restrict the scope of federal power and reject Congress's choices for the structure of the federal government. Is this even a remotely plausible cure for a deficit in democracy? Further, the partisan nature of Supreme Court decisionmaking and the happenstance of the timing of appointments to that Court aggravate the inconsistency of Hamburger's analysis with his expressed concern over the administrative state's lack of democratic accountability.

This leads me back to the aspect of Hamburger's critique that is most difficult to do justice to in this format. As discussed above, Hamburger sees in the administrative state, as did Roscoe Pound, a revival of the rejected instruments used by the English Crown to impose its will outside of Parliament and the courts of law. To Hamburger, only Parliament and the lawfully constructed courts may legitimately impose their will on the people. As Adrian Vermeule explains, this comparison is inapt for the fundamental reason that the administrative state was created by Congress ("in Parliament" as Hamburger would put it) and thus is the product of legitimate democratic

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158 See HAMBURGER, *supra* note 2, at 9.

159 The only actual recent organized political movement to limit public influence over government is the Republican voter suppression effort that involves imposing identification requirements that disproportionately prevent poor minorities from voting. See, e.g., Editorial, *Suppressing the Vote*, N.Y. TIMES (Mar. 20, 2014), <https://www.nytimes.com/2014/03/21/opinion/suppressing-the-vote.html>; Editorial, *Voter Suppression Is the Civil Rights Issue of This Era*, WASH. POST (Aug. 19, 2017), [https://www.washingtonpost.com/opinions/voter-suppression-is-the-civil-rights-issue-of-this-era/2017/08/19/926c8b58-81f3-11e7-902a-2a9f2d808496\\_story.html?utm\\_term=.B39a8dabc0d2](https://www.washingtonpost.com/opinions/voter-suppression-is-the-civil-rights-issue-of-this-era/2017/08/19/926c8b58-81f3-11e7-902a-2a9f2d808496_story.html?utm_term=.B39a8dabc0d2).

160 As James Beck recognized, the growth of the government is more likely to have resulted from what Beck viewed as an "unrestrained democracy" rather than a lack of democratic responsiveness. See BECK, *supra* note 122, at 72.

161 HAMBURGER, *supra* note 2, at 12.

processes rather than the product of tyrannical imposition by a hereditary ruler of questionable legitimacy.<sup>162</sup>

Hamburger's attack on adjudication in administrative agencies is more interesting than his broadside against the administrative state's structure and delegation of authority to agencies. Hamburger's critique of agency adjudication is twofold: first, that the Constitution vests the judicial power in the federal courts, and second, that only properly constituted courts can provide due process. The first aspect of the critique betrays Hamburger's lack of understanding of administrative law. The second is simply baffling and has no support in the law of due process.

It goes without saying that only the federal courts have the power to exercise the judicial power of the United States. But that does not prohibit the executive branch from employing an adjudicatory form when it performs an executive function. For example, if a permitting agency allows competing applicants to present their cases, supported by evidence and legal arguments, before an administrative official, the proceeding remains executive in nature even though it is conducted in an adjudicatory format. Nothing in the Constitution provides otherwise. The vagaries of Article III's Vesting Clause cannot sensibly read to prohibit executive branch officials from adopting an adjudicatory format for decisionmaking that might have been done behind closed doors in an agency office.

The question becomes a bit more complicated when federal law entrusts the decision of disputes between private parties to a non-Article III tribunal. The Supreme Court has recognized that the adjudication of private rights threatens the requirements of Article III.<sup>163</sup> Therefore, it has imposed limitations on such adjudication. First, non-Article III tribunals may not exercise certain powers reserved to the courts including "the entry of a final judgment, presiding over jury trials, and imposing criminal punishment."<sup>164</sup> These restrictions apply to all non-Article III adjudication. Second, administrative adjudication of disputes between private parties may take place only in particularized areas of law either part of or closely related to a federal regulatory scheme, the decisions must be subject to judicial review under a relatively nondeferential standard, and the parties must retain the freedom to choose an Article III court, ensuring that they are voluntarily presenting their dispute to an administrative tribunal. The Supreme Court has not applied these restrictions in a consistent manner, and reform may be in order, but there is no constitutional warrant for the wholesale rejection of agency adjudication of private disputes under the limited circumstances in which it is permitted by law.

Gary Lawson's forthcoming article attacking adjudication of patent validity in the Patent Trial and Appeal Board (PTAB) does a much better job than Hamburger of making the case that administrative adjudication of claims

162 See Vermeule, *supra* note 144.

163 See *generally* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

164 See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 494 (2011).

involving the rights of private parties violates Article III, but only if one adopts a hyperoriginalist form of constitutional interpretation.<sup>165</sup> Lawson's article uses a wealth of historical evidence to make a convincing argument that the original understanding of Article III included a prohibition on anyone but federal judges cancelling vested property rights, which PTAB has the power to do with regard to patents.<sup>166</sup> PTAB decisions are subject to judicial review in the Federal Circuit, but to Lawson this could not possibly cure the constitutional defect unless perhaps review were completely nondeferential, which it is not.<sup>167</sup>

As Lawson acknowledges, the law has veered far from a prohibition on non-Article III adjudication of private rights. There are two lines of cases at the Supreme Court level that sometimes seem in tension with one another. With regard to the federal bankruptcy courts, the Supreme Court has been relatively strict in forbidding non-Article III bankruptcy judges from adjudicating traditional private rights cases that happen to involve a party in bankruptcy proceedings.<sup>168</sup> These claims tend to arise under state common law and are viewed by the Court as in the heart of the traditional jurisdiction of the Article III courts. With regard to administrative agencies, the Court has been much less strict, allowing federal administrative agencies to adjudicate claims arising between private parties as long as the claims arise under or are closely related to federal regulatory programs.<sup>169</sup> What explains the difference?

While I do not pretend to have a complete answer, it seems to me that there are significant differences between the activities and jurisdiction of non-Article III bankruptcy judges and the activities and jurisdiction of Administrative Law Judges (ALJs). Bankruptcy judges are protojudges with potentially wide-ranging jurisdiction over claims that exist independent of federal law which parties must bring to the bankruptcy court for adjudica-

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165 See Gary Lawson, *Appallingly Illegal Adjudication: The AIA Through a Constitutional Lens*, 41 GEO. MASON L. REV. (forthcoming 2018).

166 Hamburger may disagree with Lawson on this point, at least with regard to patents, although Hamburger discusses only patent grants and not patent revocations by administrative officials. Hamburger's purpose here is to refute the argument that the longstanding tradition of administrative adjudication of patent rights is precedent for administrative adjudication of other rights. Hamburger, somewhat formalistically, concludes that patents are not like other rights granted by government because they do not bind the public, granting exclusive rights only to new inventions that no member of the public could possibly have previously used. See HAMBURGER, *supra* note 2, at 202. This is formalistic because patents do bind the public in the significant sense that the grant of a patent prohibits third parties from using the patented technology without permission of the patent holder, even if the member of the public discovered it independently. It may be that Hamburger would agree with Lawson that once granted, a patent is a vested property right that can be revoked only by an Article III court.

167 See Lawson, *supra* note 165 (manuscript at 44–46). Even with nondeferential judicial review, Lawson would probably view administrative cancellation of a vested property right as unconstitutional for violating both Article III and due process.

168 See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011).

169 See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

tion. ALJs, by contrast, operate in a relatively narrow sphere and only where a federal statute creates a federal claim. Further, the Supreme Court requires that the choice of federal administrative adjudicatory forum be voluntary, which cannot be true in the bankruptcy context. Further, it is much more realistic to consider granting Article III status to bankruptcy judges. They are a much smaller group than the cadre of federal ALJs, and they are expected to be highly skilled practitioners of bankruptcy law. The adjudication that Congress has empowered ALJs to conduct thus poses a much smaller threat to Article III than bankruptcy court adjudication.

Now let us suppose that Lawson is correct that even administrative adjudication of federal statutory claims, and other claims closely related to federal statutory claims, between two private parties is contrary to the original understanding of Article III of the Constitution. Is that a convincing argument for overthrowing decades of constitutional law and forcing Congress to eliminate important elements of federal regulatory programs, loading the federal courts up with a significant new caseload, or creating a large number of new Article III judgeships to handle an increased caseload? The *Schor* factors, which allow agency adjudication of private rights claims,<sup>170</sup> may strike a better balance, confining non-Article III adjudication to situations in which parties voluntarily choose administrative adjudication, where relatively nondeferential judicial review is available, where the move to non-Article III adjudication was not motivated by hostility toward the outcomes likely in the federal courts, and where the non-Article III adjudicator does not exercise core judicial functions such as presiding over jury trials, issuing final judgments or punishing contempt.

As in most areas of constitutional law, unless crystal-clear text dictates an answer, or a serious threat to important values or interests exists, fidelity to the original understanding ought to give way to superior policy. In my view, the *Schor* factors ensure that most administrative adjudication of private claims presents neither reason for sacrificing utility.

The availability of non-Article III adjudication in private rights cases and cases involving agency civil enforcement of regulatory standards may advance desirable goals with little or no cost to other constitutional values. The most serious problem is the claim that agencies like the SEC are increasingly turning to intra-agency enforcement because they have a “home court” advantage in cases brought before ALJs who are agency employees. A modest reform involving the creation of a panel of ALJs who are not employed by any regulatory agency may be desirable to deal with this problem, but similar problems exist with regard to Article III judges, especially among the many former prosecutors who sit on federal criminal cases. More drastic reforms, such as increasing the number of federal judges or requiring all enforcement actions to be brought directly in federal court could be problematic. Large increases in the number of federal judges and the caseload of the federal courts may threaten the overall prestige of the federal courts or the courts’ working con-

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170 See *id.* at 851.

ditions, rendering the federal government less able to attract the highest quality candidates necessary to carry out the important functions of the federal judiciary.<sup>171</sup> Further, a significantly larger corps of federal courts could threaten the federalism value inherent in a relatively small federal court system as compared to much more extensive state court systems.

Hamburger apparently recognizes that the separation of powers attack on non-Article III adjudication loses much of its force in light of the fact that the Article III courts themselves are perfectly happy to allow adjudication of a wide variety of claims outside the Article III courts. He ups the ante, however, by claiming that only actual judges, not administrative officials engaged in adjudication, are capable of providing due process.<sup>172</sup> Lawson agrees with this aspect of Hamburger's critique, finding it implicit in the Article III understanding that only judges have the power to cancel vested rights belonging to private parties. Hamburger's definition of "due process," includes a requirement that proceedings occur in the courts of law, which ipso facto means that agencies cannot provide due process.<sup>173</sup> In addition to the practical protection federal judges receive by virtue of the Constitution's provisions for life tenure and nonreducible compensation for judges, Hamburger also states that while "[i]t traditionally was theorized that the faculties of the soul consisted of intellect and will," only true judges would banish "will" and "exercise judgment independent of will."<sup>174</sup> To Hamburger, what distinguishes "law judges" from "administrative judges" is "the office or duty of judgment independent of will."<sup>175</sup> This aspect of Hamburger's argument, which echoes many views of the special place of judges, including that of Roscoe Pound, who viewed judicial review as vital to the legitimacy of the administrative state, is almost mystical—it is as if judges receive some sort of religious ordination that makes them, and only them, capable of providing due process.

Hamburger's definition of due process has little historical support and even less to commend it as a normative matter. As Judge Frank Easterbrook demonstrated more than thirty years ago, due process was originally understood to require process as required by law, whatever that might be.<sup>176</sup> It was only in recent decades that the Supreme Court rejected that historical understanding and determined that due process includes requirements of fair pro-

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171 See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

172 Hamburger disagrees with Roscoe Pound on this point. Pound stated that statutes allowing for administrative adjudication are "rightly upheld" "[s]ubject to [the] requirements of due process of law," clearly implying that the administrative tribunal is capable of providing due process. POUND, *supra* note 109, at 33.

173 See HAMBURGER, *supra* note 2, at 254.

174 *Id.* at 144. I put to one side the fact that federal judges in the United States are much more political than Hamburger acknowledges. Ideology that coincides with the partisan process of appointment is often the best explanation for decisions in controversial cases. I believe that Hamburger would define this as an exercise of "will," which judges are not supposed to do.

175 *Id.* at 146.

176 See generally Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

cedure constructed by courts.<sup>177</sup> Even then, the Court has never intimated that only courts of law are capable of providing due process. And for good reason. The federal courts would be overwhelmed if all of the situations in which government is required to provide fair procedures required a hearing in a court of law. And it would invite federal scrutiny of state courts to make sure they were structured in a way that would meet Hamburger's definition of "real" judges.

Putting the definitional aspect of Hamburger's critique to one side, the adjudication provisions of the APA are a model of due process, including fair procedures and independent adjudicators. Hamburger characterizes ALJs as agency officials judging the merits of their own organizations' cases. The APA includes extensive provisions designed to insulate ALJs from the supervision and scrutiny of officials engaged in enforcement activities, provisions that are generally considered adequate to safeguard due process.<sup>178</sup> Implicit in Hamburger's critique is an independent due process requirement for the extreme sort of insulation from potential political influence that is the aim of the protections of Article III, a requirement that will rarely, if ever, be met by decisionmakers other than federal judges. State judges, for example, may not have anything like the security of tenure enjoyed by federal judges. They may even be elected and dependent on the endorsement of a political party to get on the ballot and not be challenged in a subsequent bid for reelection. And political considerations have the potential to influence federal judges. After all, they depend on the political branches for increases in pay and improvements in working conditions, and lower court judges may look to the political branches for promotion. It is also common knowledge that the decisions of many federal judges are predictable based on their party affiliations. Hamburger's critique depends on an ideal of objectivity and neutrality that simply does not exist in any judicial system in the United States.

Related to the attack on non-Article III adjudication is Hamburger's argument that the ways in which agencies compel inspection of private business premises and require private parties to produce documents and other information is unconstitutional. In my view, because the law allows agencies to obtain warrants and subpoena documents without probable cause, the attack on agency inspections is the strongest of all the constitutional attacks on agency behavior, at least under traditional originalist constitutional law. As Hamburger explains, in a 1978 decision, the Supreme Court rejected the government's argument that no warrant was required for regulatory inspections of business premises, but this ruling was an empty victory for owners of business premises because at the same time the Court held that that "[p]robable cause in the criminal law sense is not required" for a court to issue an administrative inspection warrant.<sup>179</sup> Rather, a federal court should

177 See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

178 Administrative Procedure Act, 5 U.S.C. §§ 551, 553–559, 701–706 (2012).

179 HAMBURGER, *supra* note 2, at 264–65 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (internal quotation marks omitted)).

issue a warrant whenever an agency presents a reasonable legislative or administrative plan. This is arguably contrary to the text of the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."<sup>180</sup> Further, the history of the Fourth Amendment indicates that the Framers intended to prevent the federal government from adopting the abusive warrant practices of the colonial authorities, under which general warrants were used to harass business owners suspected of avoiding British import taxes.<sup>181</sup>

This may be another situation in which policy considerations rightly overwhelm traditional constitutional considerations. Enforcement of contemporary regulatory standards requires a level of information and access to premises far beyond what was necessary in the eighteenth century. The regulatory standards enforced through inspections and subpoenas protect the physical and financial well-being of millions of people, ranging from workers who rely on OSHA safety standards in their workplaces to patients who rely on the FDA to ensure the safety of drugs, medical devices, and food products to investors who rely on the SEC and other agencies to ensure the safety of financial products and markets. As long as Congress is the source of agency power and judicial review is available to prevent abuse, Hamburger's claim that the current regime violates Article III, the Due Process Clause, and the Fourth Amendment should be rejected.

As noted, both Lawson and Hamburger attack the administrative state for combining executive, legislative, and adjudicatory functions. Lawson specifically characterizes this as violating separation of powers while Hamburger calls it "consolidated" power, which is another way of saying that it is not subject to the checks and balances inherent in a system of separated powers. While Lawson might allow agency rulemaking and adjudication in separate administrative entities, Hamburger would banish both from the executive branch altogether. This critique is completely unconvincing because it depends on an understanding of the powers of government that is inconsistent with an important principle of American law, that an entity exercises only the power allocated to its branch of government, regardless of what form the exercise takes. This is the insight of footnote sixteen of the *Chadha* opinion, in which the Court rejected Congress's argument that if it was required to employ bicameralism and presentment to alter a person's immigration status, so was the Attorney General.<sup>182</sup> When an agency holds an adjudicatory hearing to determine whether to grant a permit or alter a person's status or impose a civil penalty, it is executing the statute that granted it the authority to act. Similarly, when an agency makes a rule specifying the permitted exposure to a toxic substance in the workplace or the appropriate level of disclosure in a financial document, it is executing the statute that granted it the authority to act. In my view, the combination of functions

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180 U.S. CONST. amend. IV.

181 See Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 221 (1995).

182 See *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).



within agencies appears problematic only if judicial review is too deferential, but that would be true whether the functions were performed by single or multiple administrative agencies.

Thus, one of Hamburger's strongest critiques of the administrative state, which applies both to agency adjudication and agency rulemaking, is that deferential judicial review does not cure the structural defects in the administrative state or make up for the due process deficit because federal courts defer to agency decisions on matters of fact, law, and policy. He has a point about deference, but the problem with deference is nowhere near serious enough to justify rejection of the fundamental structure of the administrative state.

Nondeferential judicial review would go a long way toward curing some of the defects Hamburger claims plague the administrative state. If the federal courts insisted, through nondeferential judicial review of legal questions, that agencies conform their decisions to the courts' best estimation of Congress's intent, delegation would no longer be a significant problem. Judicial deference to Congress's determination of the scope of permissible agency discretion undercuts that possible cure. Hamburger also finds deference to agency determinations to be inconsistent with fundamental notions of due process. Here he has a point. Imagine, for example, if judges in criminal cases deferred to prosecutors' views on the law or instructed juries that they should defer to prosecutors' views on the facts. No one would contend that a trial conducted under those circumstances would be fair. Without going as far as Hamburger, who contends that the characterization of agency enforcement proceedings as civil is just an excuse not to provide regulatory subjects the protections afforded to criminal suspects, it seems unfair for reviewing courts to defer to agency views.

It is, however, a gross overstatement to say that deference routinely allows an agency to judge its own cases. This would be true only if courts routinely deferred to agency litigating positions or agency determinations made only in anticipation of litigation. But properly applied, the doctrines that instruct courts to defer to agencies involve well-thought-out agency policies informed by scientific judgments, longstanding acquaintance with the issues involved or express delegations from Congress to make particular determinations.

It is also important to point out that some observers feel that judicial review is actually not very deferential at all, especially in the lower federal courts. Commentators moan and groan about how hard look judicial review has ossified the rulemaking process, frustrating agency initiatives and channeling them to less formal, and less democratic, forms of decisionmaking. While Adrian Vermeule concludes that the Supreme Court has not actually endorsed hard look review, he recognizes that some lower courts, perhaps misinterpreting the Supreme Court's instructions, have.<sup>183</sup> Federal courts, especially the D.C. Circuit, are not shy about invalidating agency action on

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183 Vermeule, *supra* note 144, at 1566.

both procedural and substantive grounds. This is true across the spectrum of agency action, from major rulemakings to individual determination of immigration status. Hamburger's portrayal of administrative agencies as exercising absolute power without control by the courts is simply inaccurate.

I agree with Hamburger that agencies can abuse deference, but courts can avoid the pitfalls of deference if they are careful to apply some simple rules: (1) defer only to longstanding, consistent agency views on law or policy when agency expertise is an important factor and only when Congress has prescribed a zone of reasonable agency action rather than a particular path the agency must take and (2) defer to agency factual determinations only when they are made after a fair hearing conducted in accordance with the requirements of due process, including an independent decisionmaker and procedures that allow all parties an adequate opportunity to prepare and present their cases. In short, while I agree with Hamburger that deference to agencies has sometimes gone too far, moderate reforms consistent with traditional administrative law doctrines would take care of the problems without the necessity of major change.

Hamburger recognizes that defenders of the administrative state often invoke necessity and the complexity of modern society as justifications for administrative law's allocation of power to agencies. Hamburger attempts valiantly to refute arguments that administrative law is an appropriate answer to the complexity and exigencies of modern society, but ultimately he fails primarily in three ways. First, his analysis here is built upon the assumption that administrative law is unconstitutional, allowing him to pose the question as whether necessity justifies violating the Constitution. That is an easy argument for him to win and does not engage with the more mainstream concern over whether the negative aspects of bureaucratic organization are worth it. Second, he turns the empirical question of whether administrative law is necessary to deal with the exigencies of modern society into a rhetorical debating game without a factual grounding for addressing whether government's important regulatory goals could be achieved without administrative law. Third, Hamburger completely ignores the fact that Congress has determined that administrative law is the best way to deal with the exigencies of modern society. Hamburger's analysis makes it appear that agencies have seized Congress's power without any legal basis and without supervision by the President or the courts.

On the first point, rather than address the state of affairs confronting modern government, Hamburger answers the claim of necessity with an assumption that administrative law is unconstitutional, a reminder that the Constitution is subject to amendment, an intellectual history of the abuse of claims of necessity in England, and a proclamation that the Constitution's Necessary and Proper Clause grants Congress the power to meet all exigencies but only "through and under the law rather than outside or above it."<sup>184</sup> This maddeningly obscure language simply restates, without analysis, the

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184 HAMBURGER, *supra* note 2, at 426.

rejection of necessity as a constitutionally proper basis for the governmental structure created by Congress. If you do not agree with Hamburger that administrative power is “extralegal,” then he has lost you, because that is his principal answer to claims that administrative law is necessary, and it pervades the remainder of his discussion of necessity.

On the second point, Hamburger provides potentially persuasive debating points to support the argument that administrative law is not necessary to deal with the complexity of modern society, but his points are not grounded in facts or evidence and thus are simply no more than debating points. For example, he asserts that a complex society can be adequately regulated via simple rules and that Congress can act more quickly than administrative agencies because it does not have to observe the APA’s timing requirements. He also asserts that administrative agencies will always be scientifically backward because, due to slow turnover of personnel in agencies, private companies will have more up to date scientists than agencies. These are theoretically possible, but he provides no reason to believe that they actually reflect reality.

Hamburger asserts that administrative discretion is not necessary to deal with the “irregularity and rapid change of modern life”<sup>185</sup> and that actually it was nondiscretionary law that “contributed much to the development of modern society, its freedom, and its wealth.”<sup>186</sup> Unquestionably, legal uncertainty can sometimes discourage investment. But there is simply no empirical support for the assertion that administrative discretion overall hampers social development. Theoretically, discretion can contribute to security by reassuring private parties that agencies will be flexible enough to prevent novel abusive practices by other private parties and by allowing government to act on substance rather than form. A government agent with discretion to pursue the purposes rather than the bare words of a provision of law might be preferable to regulated businesses. The correct answer cannot be arrived at through logical disputation, much as, despite the efforts of history’s greatest philosophers, logical argument cannot establish the existence of God.

Although I do not claim expertise on this matter and do not have the empirical support for the contrary assertion, I would point out that the countries with the most freedom and prosperity seem to be countries with more developed administrative law. Hamburger asks “Why invest, if a mere administrator . . . can later prohibit your investment? [Or] if an administrator . . . can use an interpretation or waiver to give advantages to your competitors?”<sup>187</sup> Why indeed? For some reason, invest they do, and countries like the United States, Japan, South Korea, Germany, and even China, with its bloated regulatory system in which administrative discretion is subject to constant and serious abuse, seem to attract plenty of investment. Of course, administrative law can be used for ill, to suppress freedom and human/eco-

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185 *Id.* at 432.

186 *Id.*

187 *Id.* at 433.

conomic development, but the least free and least developed countries seem to be the ones with less, rather than more, administrative law.

Ironically, Hamburger criticizes the proponents of administrative law for a lack of empirical support for their assertions that administrative law is necessary, without pausing to recognize that administrative law is the product of the democratic process and reflects Congress's judgment that it is the best way to achieve its policy goals. Important legislation such as that constituting and shaping administrative agencies embodies the collective judgment of hundreds of members of Congress and the President with input from vast constituencies. Hamburger, apparently, would have federal courts reject Congress's considered judgments, even though the courts have no capacity for empirical research and no visible constituencies to whom they answer. Courts are notorious for making decisions based on casual, unsupported assertions about the material effects of the law. It seems to me that the empirical burden is most appropriately assigned to those challenging Congress's judgments. Contrary to Hamburger's assertions, and the belief of the Supreme Court Justices who presided over the *Lochner* era's rejection of state and federal regulatory power, the Constitution of the United States does not require legislative *proof* of necessity before Congress or agencies may regulate.

Hamburger's discussion of the Federal Food and Drug Administration (FDA) is particularly revealing in that it shows that Hamburger's analysis is grounded in a libertarian critique of the regulatory system rather than a persuasive constitutional attack. Hamburger finds the FDA process for drug approval unconstitutional for two reasons: first, because the decision is made by an administrative official, not by Congress itself, and second, because the United States Constitution protects the right of companies to sell dangerous products until the government proves that they are dangerous.<sup>188</sup> Hamburger would thus allow drugs to be marketed unless and until Congress passes legislation banning the particular drug and would probably require a judicial determination of actual dangerousness to sustain Congress's judgment.

Hamburger recognizes that by imposing rigorous premarketing requirements, the FDA may have saved people from harm but he speculates that it might also have delayed access to life saving drugs.<sup>189</sup> Indeed, the impetus for strict FDA regulation was the drug thalidomide, which was widely used in other countries in the late 1950s and early 1960s to prevent nausea in pregnant women.<sup>190</sup> In the United States, a single FDA employee, not satisfied that its safety had been adequately tested, prevented its approval in the

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188 *Id.* at 433–35.

189 *See id.* at 433–34.

190 *See* Charles J. Walsh & Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 896 (1996). *See generally* HARVEY TEFF & COLIN MUNRO, *THALIDOMIDE: THE LEGAL AFTERMATH* (1976).

United States.<sup>191</sup> Then it became apparent that it was causing terrible birth defects in those countries in which it was used, and it was banned worldwide. Other than asserting that his libertarian principle is constitutionally required, Hamburger never explains why it is impermissible for Congress to take the more cautious approach and entrust an executive official with the determination of whether a particular product is safe enough to be marketed in interstate commerce.

A single Congress could not possibly make all of the decisions necessary to address the numerous complex problems that confront society today. Advancements in science exacerbate the ability of businesses to pursue profits without fully appreciating the dangers their new products entail, and the tort system, which is also under attack from conservatives who view it as limiting economic growth, does not provide an adequate safeguard against the injuries that new products might inflict. As Congress has repeatedly recognized, agencies must have broad regulatory powers and flexibility to deal with all of the permutations that confront them. Hamburger's dismissal of necessity as an adequate justification for the administrative state is simply unconvincing to anyone whose eyes are open to the realities of the modern world.

#### CONCLUSION

Two things seem clear: attacks on the administrative state are likely to continue and are likely to be unsuccessful. The federal courts are unlikely to reject the collective judgment concerning the structure of government of the thousands of people who have served in Congress over the last hundred-plus years and Congress is unlikely to endorse radical reform even if it remains in Republican control for the foreseeable future. Litigants may keep up the pressure, and the Supreme Court is likely to continue to reject attempts to violate specific procedural or structural provisions of the Constitution. But the Court is unlikely to employ general concepts of separation of powers to reshape the administrative state and is even more unlikely to reinterpret the Commerce Clause to significantly narrow the scope of federal power. In today's world of global interdependence and economic, political, and security threats emerging from every corner of the planet, any other course of action for the United States would be foolhardy.

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191 See Margaret Hamburg, *50 Years after Thalidomide: Why Regulation Matters*, FDA VOICE (Feb. 7, 2012), <https://blogs.fda.gov/fdavoices/index.php/2012/02/50-years-after-thalidomide-why-regulation-matters/>.

