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## 1930s Redux: The Administrative State Under Seige

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THE SUPREME COURT  
2016 TERM

FOREWORD:  
1930s REDUX: THE ADMINISTRATIVE STATE  
UNDER SIEGE

*Gillian E. Metzger*

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INTRODUCTION

**E**ighty years on, we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal. President Trump’s administration has proclaimed the “deconstruction of the administrative state” to be one of its main objectives.<sup>1</sup> Early Trump executive actions quickly delivered on this pledge, with a wide array of antiregulatory actions and a budget proposing to slash many agencies’ funding.<sup>2</sup> Invoking the long-dormant Congressional Review Act<sup>3</sup> (CRA), the Republican-controlled Congress has eagerly repealed numerous regulations promulgated late in the Obama Administration.<sup>4</sup> Other major legislative and regulatory repeals are pending, and bills that would impose the most significant restrictions on administrative governance since the Administrative Procedure Act (APA) was adopted in

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<sup>1</sup> See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [https://perma.cc/8KJ3-5TRR]. Although the Trump Administration official who made this proclamation, Steve Bannon, has since been removed from his position as President Trump’s Chief Strategist, that removal is unlikely to result in a large-scale change in the Trump Administration’s objectives with respect to the administrative state. See Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 29, 2017, 5:26 AM), <https://twitter.com/realDonaldTrump/status/902507855584092160> [https://perma.cc/8LFX-LCGH] (reiterating the need to “reduce [the] size of government”); see also Josh Dawsey & Nolan D. McCaskill, *Bannon Out as White House Chief Strategist*, POLITICO (Aug. 18, 2017, 6:16 PM), <http://www.politico.com/story/2017/08/18/bannon-out-as-white-house-chief-strategist-241786> [https://perma.cc/DJH2-JJ5D].

<sup>2</sup> See *infra* pp. 9–11.

<sup>3</sup> 5 U.S.C. §§ 801–808 (2012).

<sup>4</sup> See *infra* pp. 10–11.

1946 — like the proposed Regulatory Accountability Act (RAA) — now stand a chance of enactment.<sup>5</sup> This resistance to administrative government reflects antigovernment themes that have been a consistent presence in national politics since President Reagan’s election in 1980.<sup>6</sup> But the immediate trigger for the current resurgence of attacks on the administrative state is the national regulatory and administrative expansion that took place under President Obama.<sup>7</sup>

Of particular relevance here, an attack on the national administrative state is also evident at the Supreme Court. The anti-administrative voices are fewer on the Court than in the political sphere and often speak in separate opinions, but they are increasingly prominent.<sup>8</sup> Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, they have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional.<sup>9</sup> Conservative legal scholars have joined the fray, issuing a number of academic attacks on the constitutionality of the administrative state that conservative jurists then feature prominently in their opinions.<sup>10</sup> These judicial attacks on administrative governance share several key characteristics: they are strong on rhetorical criticism of administrative government out of proportion to their bottom-line results; they oppose administration and bureaucracy, but not greater presidential power; they advocate a greater role for the courts to defend individual liberty against the ever-expanding national state; and they regularly condemn contemporary national government for being at odds with the constitutional structure the Framers created, though rarely — with the marked exception of Justice Thomas — do they develop this originalist argument with any rigor.<sup>11</sup>

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<sup>5</sup> See *infra* section I.A; see also Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

<sup>6</sup> See *infra* p. 14.

<sup>7</sup> See, e.g., THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 5–10, 31–32, 77–82 (2012) (tying Tea Party mobilization to President Obama’s progressive policy agenda); Zeke J. Miller, *President Trump’s Lawyers Plan a White House Legal Attack on Federal Agency Power*, TIME (Mar. 13, 2017), <http://time.com/4700311/donald-trump-white-house-counsel-steve-bannon> [<https://perma.cc/M7SP-JFN7>] (“But the fight against [the administrative state’s] growth became a crusade during the Obama years, particularly in conservative legal circles as they watched the former president rel[y] on regulatory action to circumvent an obstructionist Congress.”); see also Robert Moffit, Todd Gaziano & Joseph Postell, *How to Limit Government in the Age of Obama*, HERITAGE FOUND. (June 25, 2013), <http://www.heritage.org/political-process/report/how-limit-government-the-age-obama> [<https://perma.cc/XXLX6-PB9G>] (discussing tactics to fight against President Obama’s regulatory policy through Congress and the courts).

<sup>8</sup> Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42–43.

<sup>9</sup> See *infra* sections I.B.1–3, pp. 17–31.

<sup>10</sup> See *infra* section I.B.4, pp. 31–33.

<sup>11</sup> See *infra* section I.C, pp. 33–46.

These features, particularly the strong rhetorical condemnation of administrative government, typify what I call here contemporary anti-administrativism. The presence of such rhetorical anti-administrativism in the political sphere is not surprising, but its appearance in judicial opinions is more striking. This rhetorical anti-administrativism forms a notable link between the contemporary political and judicial attacks on national administrative government. Further connecting these two is the political flavor of many of the lawsuits underlying the current judicial attacks, as well as a shared network of conservative lawyers, organizations, academics, and funders involved in both.<sup>12</sup>

The 2016 Term saw few cases embodying the judicial attacks on administrative governance and administrative law doctrines that have surfaced in recent years. Nonetheless, anti-administrativism was central to the Term's most important event: the appointment of Justice Gorsuch to the Court. In a concurring opinion issued shortly before his nomination, then-Judge Gorsuch staked out a strongly anti-administrative position. He warned against "permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design," and drew a straight line from such institutional expansion to "governmental encroachment on the people's liberties."<sup>13</sup> These anti-administrative views quickly became a centerpiece of Gorsuch's Senate confirmation hearings — surely never before have so many senators spoken at such length about the *Chevron*<sup>14</sup> doctrine of judicial deference to administrative statutory interpretations.<sup>15</sup>

Whether these anti-administrative attacks will ultimately prove successful — and which ones — remains to be seen. The lack of administrative retraction under President Reagan offers reason for doubt that major politically imposed transformations will occur, and President Trump's campaign promises for infrastructure development, an enhanced military, and a crackdown on illegal immigration all entail the

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<sup>12</sup> See *infra* sections I.C, pp. 33–46; II.B, pp. 62–71.

<sup>13</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Gorsuch had signaled such concerns before, though not quite as vociferously. See *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 969 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015); Neil M. Gorsuch, Lecture, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 911–15 (2016).

<sup>14</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>15</sup> In their brief opening statements, three of the eight Democratic senators expressed their concerns over then-Judge Gorsuch's views on *Chevron*. See *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States*, S. COMM. ON THE JUDICIARY at 42:33 (Mar. 20, 2017) [hereinafter *Gorsuch Confirmation Hearings (Day 1)*], <https://www.judiciary.senate.gov/hearings/watch?hearingid=DD159112-5056-A066-6024-CF83920A9E17> [<https://perma.cc/DKR7-2M9E>] (opening statement of Sen. Feinstein); *id.* at 2:06:49 (opening statement of Sen. Klobuchar); *id.* at 2:29:01 (opening statement of Sen. Franken).

administrative state's expansion, not its deconstruction. On the judicial front, the most radical constitutional challenges so far have gained little traction, with majority support limited to claims that tinker with the administrative state at the margin.<sup>16</sup> With Justice Gorsuch on the Court, some constitutionally rooted pullback in deference doctrines appears increasingly likely.<sup>17</sup> But whether these doctrinal tweaks will make much of a difference in practice is a matter of substantial dispute.<sup>18</sup>

Yet dismissing the present anti-administrative moment as a passing craze with little long-term impact would be a mistake. Enactment of measures like the RAA, regulatory rollbacks, and significant cutbacks in agency funding could have a lasting effect on the administrative state's functioning and capacity. Challenges to administrative adjudication on the horizon may portend more dramatic judicial decisions, and some seemingly limited constitutional challenges could yield significant administrative disruption. Even kept to a vocal minority, moreover, constitutional attacks can have an outsized effect by sowing doubts about administrative legitimacy and thereby limiting the progressive potential of — and public support for — administrative government in the future. And the vocal minority on the courts is likely to grow so long as the political branches remain in conservative hands and openly anti-administrative organizations dominate the judicial appointments process.<sup>19</sup> The Trump Administration inherited an extraordinarily large

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<sup>16</sup> See *infra* section I.D, pp. 46–51.

<sup>17</sup> Justice Gorsuch has expressed more open hostility to doctrines such as *Chevron* than his predecessor, Justice Scalia, did. See Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html> [<https://perma.cc/S5E5-A6UR>].

<sup>18</sup> See *infra* pp. 48–49. Compare Adrian Vermeule, *The Separation of Powers Restoration Act (in the Age of Trump)*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 10, 2016), <http://yalejreg.com/nc/the-separation-of-powers-restoration-act-in-the-age-of-trump-by-adrian-vermeule/> [<https://perma.cc/3VuC-593L>] (noting that even without *Chevron*, courts “might decide that deference just is what the statutory law commands”), with Bazelon & Posner, *supra* note 17 (arguing that without *Chevron* ambiguous statutory text may have to be sent back to Congress “to redo or not”).

<sup>19</sup> Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <http://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/DW43-NYXF>] (describing the role of Leonard Leo, Executive Vice President of the Federalist Society, in the Trump Administration's judicial-selection process); *About Heritage*, HERITAGE FOUND., <http://www.heritage.org/about-heritage/impact> [<http://perma.cc/TC7B-KB4E>] (“Since our founding in 1973, The Heritage Foundation has been working to advance the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.”). For an example of the Federalist Society's views on administrative government, see generally LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds., 2016). The national administrative state is the subject of the Federalist Society's annual convention this year. See *2017 National Lawyers Convention: Administrative Agencies and the Regulatory State*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., <https://www.fed-soc.org/events/detail/2017-national-lawyers-convention> [<https://perma.cc/9FVD-69TR>].

number of judicial vacancies — more than any recent President since Bill Clinton — and will likely have additional Supreme Court vacancies to fill.<sup>20</sup> The potential thus exists for a significant erosion of administrative power, albeit perhaps one achieved more incrementally and more targeted to particular substantive areas than a sudden or broad retraction in the administrative state.

Equally important, the current judicial attack on the administrative state merits attention because of the potential harm it poses for the Court and for constitutional law. Although resistance to strong central government has a long legacy in the United States, the real forebears of today's anti-administrative movement are not the Framers but rather the conservative opponents of an expanding national bureaucracy in the 1930s. Like today, the 1930s attack on "agency government" took on a strongly constitutional and legal cast, laced with rhetorical condemnation of bureaucratic tyranny and administrative absolutism.<sup>21</sup> These efforts were plainly political, fueled by business and legal interests deeply opposed to pro-labor regulation and economic planning. The Supreme Court's constitutional opposition to early New Deal measures carried heavy political salience as well, triggering President Franklin Delano Roosevelt's contentious plan to pack the Court.<sup>22</sup> A similar political aspect is inseparable from the contemporary administrative attack, as the nomination process for Justice Gorsuch demonstrated.<sup>23</sup>

To acknowledge the political cast of contemporary anti-administrativism is not to question that genuine constitutional concerns animate it. Such close intertwining of the political and constitutional is characteristic of efforts to construct a new institutional order — and was as true of progressive efforts to build out the New Deal administrative state in the 1930s as it is of contemporary anti-administrativism's effort to reign in that state today. But recognizing this political cast, and the parallels to the 1930s conservative attacks on the New Deal, demonstrates anti-administrativism's radical potential. It also underscores the extent to which judicial opinions that decry the dangers of the ever-expanding administrative state risk reinforcing the intense politicization of the

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<sup>20</sup> See Jonathan H. Adler, *How President Trump Will Shape the Federal Courts*, WASH. POST: VOLOKH CONSPIRACY (Jan. 20, 2017), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/20/how-president-trump-will-shape-the-federal-courts/> [https://perma.cc/PAD4-2D4P]; Ryan Lovelace, *Trump Adviser Leonard Leo Details Plans to Overhaul Judiciary*, WASH. EXAMINER (May 12, 2017, 2:00 PM), <http://www.washingtonexaminer.com/trump-adviser-leonard-leo-details-plans-to-overhaul-judiciary/article/2622956> [https://perma.cc/UPT3-6HAW] (noting that Trump already has 134 judicial openings to fill and may eventually have as many as 200, as well as three Supreme Court vacancies).

<sup>21</sup> See *infra* section II.A, pp. 52–62.

<sup>22</sup> See *id.*; see also WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132–62 (1995) (discussing President Roosevelt's "court-packing" plan and the controversy surrounding it).

<sup>23</sup> See *infra* section II.B, pp. 62–71.

Court — a result particularly hard to justify when (at least so far) these opinions' bottom-line impact does not match their polarizing rhetoric.

Perhaps most problematic, anti-administrativism misdiagnoses the administrative state's constitutional status. Anti-administrativists paint the administrative state as fundamentally at odds with the Constitution's separation of powers system, combining together in agencies the legislative, executive, and judicial authorities that the Constitution vests in different branches and producing unaccountable and aggrandized power in the process. In fact, however, the administrative state is essential for actualizing constitutional separation of powers today, serving both to constrain executive power and to mitigate the dangers of presidential unilateralism while also enabling effective governance. Far from being constitutionally suspect, the administrative state thus yields important constitutional benefits. Anti-administrativists fail to recognize that the key administrative state features that they condemn, such as bureaucracy with its internal oversight mechanisms and expert civil service, are essential for the accountable, constrained, and effective exercise of executive power.

Even further, the administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government. Those delegations are necessary given the economic, social, scientific, and technological realities of our day. Not surprisingly, therefore, very few anti-administrativists are willing to call such delegation of power into serious constitutional question. But they fail to realize that delegation comes with substantial constitutional strings attached. In particular, many of the administrative state's features that anti-administrativists decry follow as necessary consequences of delegation.

By refusing to recognize the administrative state's essential place in our constitutional order, contemporary anti-administrativism forestalls development of a separation of powers analysis better tailored to the reality of current government. Rather than laying siege to the administrative state, such an analysis would seek to maximize the constitutional benefits that the administrative state has to offer. And it would reorient constitutional analysis to considering not just constitutional constraints on government but also constitutional obligations to govern.

Part I of what follows describes the current attacks on the administrative state and assesses their central analytic moves, focusing in particular on judicial anti-administrativism. It then takes up the question of whether the current attack is likely to make a difference, arguing that this attack holds greater significance for national administrative governance than might at first appear. Part II adopts a historical lens, identifying contemporary anti-administrativism as the latest episode in a conservative campaign against administrative governance that stretches back to the early twentieth century, in particular to battles over the New



Deal in the 1930s. After highlighting parallels between the contemporary attacks and 1930s efforts to hamstring New Deal administrative agencies, Part II draws out cautionary historical lessons for the Court. Part III turns to analyzing the constitutional functions of the administrative state. Here, too, the 1930s hold important lessons, underscoring the administrative state's constitutional role in both enabling and constraining executive power. Recognizing these constitutional functions opens the door to a very different account of the administrative state's constitutional status from what the anti-administrativists offer. This Part then takes the constitutional argument a step further, contending that the contemporary reality of delegation makes core features of the administrative state constitutionally obligatory.

A word on terminology at the outset: The term “administrative state” is frequently bandied about, but often carries very different meanings. In promising to deconstruct the administrative state, for instance, the Trump Administration presumably does not mean to include the mechanisms of bureaucratic power that allow the President to oversee agency actions. As used here, the administrative state includes those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration — including that which occurs in hybrid forms and spans traditional public-private and nation-state boundaries.<sup>24</sup> An unfortunate implication of invoking the administrative state writ large is that it conveys the idea of a single monolithic entity, whereas in reality national administrative government contains within it tremendous variety, cooperation, and rivalry — a pluralistic dynamic that obtains within individual agencies as well. The administrative state writ large is nonetheless a helpful analytic conceit here as a stand-in for the archetypal characteristics of national administrative government now under attack.

## I. THE CONTEMPORARY ATTACK ON THE ADMINISTRATIVE STATE

Across a range of public arenas — political, judicial, and academic in particular — conservative and libertarian challenges to administrative governance currently claim center stage. Sustained resistance to

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<sup>24</sup> See Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855–63 (2014).

national administrative power is no stranger to American public life. It has been a feature of national politics for decades, going back to the Reagan revolution of the 1980s and Barry Goldwater's 1964 presidential campaign that preceded it.<sup>25</sup> The striking feature of the current challenges, however, is the extent to which they are surfacing in court and being framed in terms of constitutional doctrine. The problems these attacks identify with the administrative state are not simply the policies it advances, its role as the engine for social regulation, or its domination by progressive bureaucrats. More than this, the national administrative state is attacked as fundamentally unconstitutional. While still a minority position, this view is gaining more judicial and academic traction than at any point since the 1930s.

The first step in assessing the significance of the current attack is understanding its full contours. This Part takes on that descriptive task, detailing the current attacks on administrative governance. It focuses in greatest detail on the attack in the courts, where a variety of legal challenges, some constitutional and some not, are surfacing. This Part then identifies and examines several central features that these attacks on the administrative state share and assesses their likely impact.

### A. *The Political Attack*

The political attack on the national administrative state is hard to miss. Even separate from the Trump Administration's promise to "deconstruct[] the administrative state" or its identification of a dangerous "deep state" opposed to the President, the Administration's initial actions have been aggressively antiregulatory.<sup>26</sup> These actions include specific area rollbacks, such as instructions that agencies repeal, waive, or delay implementation of major Obama Administration regulatory initiatives in the environmental, financial regulation, and health care arenas.<sup>27</sup> But they also encompass dramatic transsubstantive measures, in particular requirements that agencies establish task forces focused on

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<sup>25</sup> Leading accounts of contemporary American conservatism date its birth to the 1950s, but it only appeared in contemporary national political life with the Goldwater campaign and did not gain significant popular traction until Reagan. See LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 111–46, 187–216 (2001).

<sup>26</sup> See Rucker & Costa, *supra* note 1; Matthew Nussbaum et al., *Trump's Obsession over Russia Probe Deepens*, POLITICO (May 28, 2017, 10:10 PM), <http://www.politico.com/story/2017/05/28/trump-russia-advice-238911> [<https://perma.cc/94U8-3PAJ>].

<sup>27</sup> Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (Promoting Energy Independence and Economic Growth); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017) (Core Principles for Regulating the United States Financial System); Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 24, 2017) (Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal); see also Fiduciary Duty Rule, Memorandum for the Secretary of Labor, 82 Fed. Reg. 9675 (Feb. 7, 2017).

regulatory repeal,<sup>28</sup> repeal two regulations for each new regulation they propose, and keep additional regulatory costs at zero.<sup>29</sup> President Trump's cabinet is composed of individuals who have long opposed the agencies and programs they now lead<sup>30</sup> and his budget proposes to dramatically slash funding for a large swath of nonmilitary agencies.<sup>31</sup> Business interests are enjoying a regulatory retraction of unprecedented proportions, with the combination of executive branch actions and Congress's disapproval of late Obama Administration rules under the CRA.<sup>32</sup> By the time the window for disapproval closed, Congress had overturned fourteen Obama regulations — which was thirteen more regulatory disapprovals than had previously occurred in the CRA's

<sup>28</sup> See Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017) (Enforcing the Regulatory Reform Agenda); Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html> [https://perma.cc/7XRZ-3ZYJ].

<sup>29</sup> See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (Reducing Regulation and Controlling Regulatory Costs); Memorandum from Dominic J. Mancini, Acting Adm'r, Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. of Certain Agencies and Comm'ns (Feb. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/interim-guidance-implementing-section-2-executive-order-january-30-2017> [https://perma.cc/2NBH-LW56]. For early assessments of President Trump's administrative agenda, see Daniel A. Farber, *Presidential Administration Under Trump* 16–21 (Univ. of Cal. Berkeley Pub. Law Research Paper, 2017), <https://ssrn.com/abstract=3015591> [https://perma.cc/B782-MCA9]; and Peter L. Strauss, *The Trump Transition and American Administrative Law* (May 2017) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>30</sup> See, e.g., Juliet Eilperin & Steven Mufson, *Trump Taps Former Texas Gov. Rick Perry to Head Energy Department He Once Vowed to Abolish*, WASH. POST (Dec. 14, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/trump-taps-former-texas-gov-rick-perry-to-head-energy-department-he-once-vowed-to-abolish/> [https://perma.cc/JLH5-CHBR]; Eric Lipton & Coral Davenport, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors over Regulators*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html> [https://perma.cc/DP3W-CJW2]; see also Kate Zernike, *Betsy DeVos, Trump's Education Pick, Has Steered Money from Public Schools*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/betsy-devos-trumps-education-pick-has-steered-money-from-public-schools.html> [https://perma.cc/X96D-29UK] (describing Secretary DeVos's prior efforts to shift funding away from public schools).

<sup>31</sup> Gregor Aisch & Alicia Parlapiano, *How Trump's Budget Would Affect Every Part of Government*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/interactive/2017/05/23/us/politics/trump-budget-details.html> [https://perma.cc/U5H5-JHCX]; Kim Soffen & Denise Lu, *What Trump Cut in His Agency Budgets*, WASH. POST (May 23, 2017), <https://www.washingtonpost.com/graphics/politics/trump-presidential-budget-2018-proposal/> [https://perma.cc/RHC7-BXTY].

<sup>32</sup> Per a count by the *New York Times*, over ninety Obama-era regulations were delayed, suspended, or reversed in President Trump's first month and a half in office alone. Eric Lipton & Binyamin Appelbaum, *Leashes Come off Wall Street, Gun Sellers, Polluters and More*, N.Y. TIMES (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html> [https://perma.cc/HF7E-WS5Y]; see also Barry Meier & Danielle Ivory, *Under Trump, Worker Protections Are Viewed with New Skepticism*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/business/under-trump-worker-protections-are-viewed-with-new-skepticism.html> [https://perma.cc/TY3H-XRZJ]; Hiroko Tabuchi & Eric Lipton, *How Rollbacks at Scott Pruitt's E.P.A. Are a Boon to Oil and Gas*, N.Y. TIMES (May 20, 2017), <https://www.nytimes.com/2017/05/20/business/energy-environment/devon-energy.html> [https://perma.cc/Z9NU-SKZB].

twenty-one year life.<sup>33</sup> Agency teams — often with business ties — have sought to delay numerous rules immediately, although such efforts have already faced resistance from courts.<sup>34</sup> Importantly, the Trump Administration has also proposed some measures that would expand the administrative state — for example, by adding over 15,000 more immigration employees.<sup>35</sup> And some ostensibly deregulatory measures, such as congressional Republicans’ efforts to repeal the Affordable Care Act, may well entail substantial grants of new administrative authority.<sup>36</sup> But the overall thrust since the Trump Administration came into office has been in a strongly deregulatory direction.

Even more significant for the administrative state would be enactment of congressional measures like the proposed RAA. The Senate’s version of the RAA would require agencies, upon request, to hold oral evidentiary hearings on any “specific scientific, technical, economic, or other complex factual issues that are genuinely disputed” in high-impact rulemakings (those with an expected annual economic impact of \$1 billion or more) and in some major rulemakings (those with an expected annual economic impact of \$100 million or more).<sup>37</sup> It would also limit the use of interim final rulemaking, require high-impact rules to meet a higher evidentiary standard, and limit judicial deference to an agency’s

<sup>33</sup> See Alex Guillén, *GOP Onslaught on Obama’s “Midnight Rules” Comes to an End*, POLITICO (May 7, 2017, 7:10 AM), <http://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051> [https://perma.cc/Y29R-MM8B]. Conservative leaders within and outside Congress are trying to expand the CRA’s reach further, arguing that it should apply to guidance and to rules never properly submitted for congressional review in the past. PHILIP A. WALLACH & NICHOLAS W. ZEPPOS, BROOKINGS INST., *HOW POWERFUL IS THE CONGRESSIONAL REVIEW ACT?* (2017), <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/> [https://perma.cc/P3NJ-K2U8]; Arianna Skibell, *GAO to Review Guidance Docs as Republicans Test CRA’s Reach*, E&E NEWS: GREENWIRE (May 25, 2017), <https://www.eenews.net/greenwire/stories/1060055171> [https://perma.cc/3CCC-J9B2].

<sup>34</sup> See, e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (invalidating the EPA’s stay of methane rule); Juliet Eilperin & Damian Paletta, *Trump Administration Cancels Hundreds of Obama-Era Regulations*, WASH. POST (July 20, 2017), [https://www.washingtonpost.com/business/economy/trump-administration-cancels-hundreds-of-obama-era-regulations/2017/07/20/55f501cc-6d68-11e7-96ab-5f38140b38cc\\_story.html](https://www.washingtonpost.com/business/economy/trump-administration-cancels-hundreds-of-obama-era-regulations/2017/07/20/55f501cc-6d68-11e7-96ab-5f38140b38cc_story.html) [https://perma.cc/5QPL-AMU5].

<sup>35</sup> Eric Katz, *Trump’s Orders Calling for 15,000 New Federal Employees Could Face Setbacks*, GOV’T EXECUTIVE (Jan. 26, 2017), <http://www.govexec.com/management/2017/01/trumps-orders-calling-15000-new-employees-could-face-setbacks/134929> [https://perma.cc/P6VG-VYCG]. Most recently, President Trump proposed and then signed into law a multibillion dollar expansion in federal disaster relief. See Mike DeBonis & Kelsey Snell, *Trump Signs \$15 Billion Harvey Aid Package After Republicans Boomed Top White House Officials*, WASH. POST: POWERPOST (Sept. 8, 2017), [https://www.washingtonpost.com/powerpost/house-set-to-vote-today-on-harvey-aid-package-that-would-also-raise-debt-ceiling/2017/09/08/728ddce8-9494-11e7-8754-d478688d23b4\\_story.html](https://www.washingtonpost.com/powerpost/house-set-to-vote-today-on-harvey-aid-package-that-would-also-raise-debt-ceiling/2017/09/08/728ddce8-9494-11e7-8754-d478688d23b4_story.html) [https://perma.cc/8478-36ZZ].

<sup>36</sup> Stan Dorn & Sara Rosenbaum, *Senate Health Care Legislation Would Grant HHS Unprecedented Power over States*, HEALTH AFF. BLOG (July 24, 2017), <http://healthaffairs.org/blog/2017/07/24/senate-health-care-legislation-would-grant-hhs-unprecedented-power-over-states> [https://perma.cc/SXA6-QQM2].

<sup>37</sup> S. 951, 115th Cong. §§ 2–3 (2017).

interpretations of its own rules.<sup>38</sup> The House version is more extreme, requiring an agency to hold formal trial-like hearings when proposing a high-impact rule and, for all rulemakings, often to hold an initial hearing at which interested parties can challenge the information on which the agency plans to rely.<sup>39</sup> Both bills would also impose additional evaluation requirements on agencies and expand the availability of judicial review of agency actions;<sup>40</sup> and the House version forbids agencies from implementing rules until all legal challenges to them are resolved.<sup>41</sup> Additionally, the House incorporated the proposed Separation of Powers Restoration Act in its version, which would require courts to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”<sup>42</sup> Although some question how burdensome the Senate version would be,<sup>43</sup> past experience with oral hearing and trial-type procedures under the APA’s formal rulemaking provisions and other statutes strongly suggests that both measures would be significantly onerous and resource consuming for agencies.<sup>44</sup> A separate proposed measure, the Regulations from the Executive in Need of Scrutiny (REINS) Act, would not impose additional procedures on agencies but instead require Congress enact a joint resolution of approval before any major rule could go into effect.<sup>45</sup> Given the notorious difficulty Congress has had recently in

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<sup>38</sup> *Id.* §§ 3–4.

<sup>39</sup> H.R. 5, 115th Cong. § 103 (2017).

<sup>40</sup> *See id.*; S. 951 §§ 3–4.

<sup>41</sup> H.R. 5 § 402 (Require Evaluation Before Implementing Executive Wishlists Act).

<sup>42</sup> *Id.* §§ 201–202; *see also* H.R. 76, 115th Cong. (2017) (as a standalone bill).

<sup>43</sup> Compare Kent Barnett, Opinion, *Looking More Closely at the Platypus of Formal Rulemaking*, REG. REV. (May 11, 2017), <https://www.theregreview.org/2017/05/11/Barnett-platypus-formal-rulemaking> [<https://perma.cc/D7DX-Y7DP>], and Cass R. Sunstein, Opinion, *A Regulatory Reform Bill that Everyone Should Like*, BLOOMBERG VIEW (June 22, 2017, 8:30 AM), <https://www.bloomberg.com/view/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like> [<https://perma.cc/6HHT-D8V5>] (largely supporting the RAA), with William W. Buzbee, Opinion, *Regulatory “Reform” that Is Anything But*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/opinion/regulatory-reform-bills-congress-trump.html> [<https://perma.cc/K3QW-5ED6>] (arguing against the RAA), and William Funk, Opinion, *Requiring Formal Rulemaking is a Thinly Veiled Attempt to Halt Regulation*, REG. REV. (May 18, 2017), <https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/> [<https://perma.cc/2Y88-WDBS>].

<sup>44</sup> *See* Funk, *supra* note 43; *see also* Martha Roberts, Opinion, *The Misguided Regulatory Accountability Act*, REG. REV. (Mar. 29, 2017), <https://www.theregreview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/> [<https://perma.cc/386L-RVKW>] (arguing that the RAA would impose cost assessment and formal rulemaking requirements that hobbled the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2697 (2012), prior to that Act’s reform). *But see* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 240–42 (2014) (arguing that the lengthy delays of prior formal rulemakings could have been averted and that the benefits of formal rulemaking may justify such cost in some circumstances).

<sup>45</sup> *See* H.R. 26 § 3, 115th Cong. (2017).

passing legislation, the REINS Act would even more clearly stop regulation in its tracks.<sup>46</sup>

Much advocacy for these legislative and regulatory measures describes administrative government in harsh terms, for example invoking the need to rein in an “out-of-control bureaucracy”<sup>47</sup> intent on imposing costly, “job-crushing” regulations.<sup>48</sup> An equally frequent refrain is condemnation of rampant “Obama administration overreach.”<sup>49</sup> Yet in 2017 the RAA’s backers adopted a more constitutional register, arguing that “[i]n recent years . . . we have seen th[e] separation of powers undermined by an overzealous bureaucracy that creates laws, then executes those laws, and then acts as their own appeal authority.”<sup>50</sup> No doubt this constitutional turn reflects in part the separation of powers concerns now expressly in the bill. But such constitutional rhetoric also surfaces in the REINS Act, which emphasizes that the Constitution vests the legislative power in Congress.<sup>51</sup> It was also strongly present in the 2016 Republican national platform, which repeatedly portrayed the growth in the national administrative state as a constitutional crisis.<sup>52</sup> And it echoes the heavily constitutional discourse of the Tea Party, whose 2010 protests against the financial bailouts and the Affordable Care Act in the name of limited government and fiscal constraint marked the advent of the current anti-administrative moment.<sup>53</sup>

Trump is hardly the first or even the most anti-administrative modern President. President Richard Nixon also repeatedly attacked the

<sup>46</sup> Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1458–60 (2015).

<sup>47</sup> 163 CONG. REC. H900 (daily ed. Feb. 2, 2017) (statement of Rep. Walorski on H.R.J. Res. 40, 115th Cong. (2017)).

<sup>48</sup> President Donald J. Trump, Remarks in Joint Address to Congress (Feb. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress> [<https://perma.cc/HQT4-L88A>]; see also 161 CONG. REC. H249 (daily ed. Jan. 13, 2015) (statement of Rep. Goodlatte) (“What is killing the American Dream . . . is the endless drain of resources that takes working people’s hard-earned wages to Washington . . .”); 157 CONG. REC. 18,685 (2011) (statement of Rep. Smith) (noting the “job-killing cost of regulations”); *id.* at 18,687 (statement of Rep. Coble) (stating the “regulatory process is out of control”).

<sup>49</sup> 163 CONG. REC. H900 (daily ed. Feb. 2, 2017) (statement of Rep. Walorski on H.R.J. Res. 40, 115th Cong. (2017)); 163 CONG. REC. H761 (daily ed. Jan. 31, 2017) (statement of Rep. Newhouse on H.R.J. Res. 38, 115th Cong. (2017)); see 163 CONG. REC. H903 (daily ed. Feb. 2, 2017) (statement of Rep. Arrington on H.R.J. Res. 40, 115th Cong. (2017)).

<sup>50</sup> 163 CONG. REC. H253 (daily ed. Jan. 10, 2017) (statement of Rep. Bacon); see also 163 CONG. REC. H328–29 (daily ed. Jan. 11, 2017) (statement of Rep. McCarthy).

<sup>51</sup> See H.R. 26, 115th Cong. § 2 (2017).

<sup>52</sup> See 2016 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PLATFORM 2016, at 9–10 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_I2\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_I2_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/YFJ4-VB75>].

<sup>53</sup> SKOCPOL & WILLIAMSON, *supra* note 7, at 7–10, 31–32, 160; Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011) (discussing the Tea Party as a form of popular constitutionalism).

federal bureaucracy,<sup>54</sup> and President George W. Bush was famous for centralizing and politicizing the executive branch to bring administrative government more under his control.<sup>55</sup> Democratic Presidents have done their share of bureaucracy bashing as well, with President Bill Clinton proclaiming that the “era of big Government is over”<sup>56</sup> and Vice President Al Gore spearheading the New Performance Review, an effort “to change the culture of our national bureaucracy away from complacency and entitlement” and to provide the “honest and efficient” government that the “American people deserve . . . [but] for too long . . . haven’t gotten.”<sup>57</sup> The closest parallel to President Trump, however, is President Ronald Reagan, who campaigned on similar promises of dramatically cutting back the national government and made regulatory relief “one of the four ‘cornerstones’” of his program for economic recovery.<sup>58</sup> Reagan is credited with prominently injecting antigovernmental rhetoric back into national political discourse; he famously proclaimed in his first inaugural address that “government is not the solution to our problem; government is the problem.”<sup>59</sup> Reagan, too, appointed outsiders committed to rolling back the agencies they led, slashed agency budgets, and pushed for repeal of statutes requiring extensive regulatory regimes as well as abolition of some agencies.<sup>60</sup>

The promises of regulatory reduction and downsizing of government, however, largely went unfulfilled. Much of the deregulation achieved under Reagan resulted from controlling implementation and administration of existing statutes, not from legislative repeals.<sup>61</sup> More to the point,

<sup>54</sup> RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 8–9 (1983).

<sup>55</sup> See, e.g., David J. Barron, Foreword, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1128 (2008); Peter L. Strauss, Foreword, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 719–38 (2007).

<sup>56</sup> Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79 (Jan. 23, 1996).

<sup>57</sup> Remarks Announcing the National Performance Review, 1 PUB. PAPERS 233–34 (Mar. 3, 1993).

<sup>58</sup> Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 261 (1986) (quoting Press Release, Office of the White House Press Sec’y, Statement of the President on Regulatory Relief (June 5, 1981), reprinted in MATERIALS ON PRESIDENT REAGAN’S PROGRAM OF REGULATORY RELIEF 1 (1981), <https://reaganlibrary.gov/digitalibrary/smof/cos/ciconi/Box-12/40-94-6914308-012-007-2016.pdf> [<https://perma.cc/856R-MABF>]).

<sup>59</sup> Inaugural Address, 1 PUB. PAPERS 1 (Jan. 20, 1981); see also ALLAN J. LICHTMAN, *WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT* 350 (2008); SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974–2008*, at 127–28, 136 (2008).

<sup>60</sup> WILENTZ, *supra* note 59, at 140–41, 169; Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan’s First Term*, 2 YALE J. ON REG. 293, 297–303 (1985); McGarity, *supra* note 58, at 262–68.

<sup>61</sup> LICHTMAN, *supra* note 59, at 354; MEG JACOBS & JULIAN E. ZELIZER, *CONSERVATIVES IN POWER: THE REAGAN YEARS, 1981–1989*, at 38–39 (2011).

the Reagan Administration's efforts at deregulation and curtailing administrative government are largely considered a failure.<sup>62</sup> Governmental spending increased, no major domestic programs were terminated, and by the start of Reagan's second term regulatory relief was firmly off the agenda.<sup>63</sup> If anything, the Reagan era sowed the seeds for what conservatives today view as executive overreach. It was the Reagan Administration's deregulatory efforts that produced the *Chevron* doctrine and deference to an agency's reasonable interpretation of ambiguous statutes that it implements.<sup>64</sup> It was also the Reagan Administration that developed centralized regulatory review and pushed for recognition of constitutionally protected presidential control of administration.<sup>65</sup> Over subsequent decades both Republican and Democratic Presidents developed these tools of presidential control even further. In particular, President Obama used his powers of administrative direction and oversight to push progressive policies stymied in Congress.<sup>66</sup> Once Republican mainstays, *Chevron* deference and presidential administrative control quickly became the *bêtes noires* of conservatives.<sup>67</sup>

Thus, if past experience is any guide, the current political attack seems unlikely to dramatically transform the administrative state. Administrative government's endurance reflects basic political as well as economic, social, and technological realities. An administrative state is

<sup>62</sup> WILENTZ, *supra* note 59, at 194–96.

<sup>63</sup> JACOBS & ZELIZER, *supra* note 61, at 28–33, 40–41; Fix & Eads, *supra* note 60, at 293, 304; McGarity, *supra* note 58, at 268–70. Similar antiregulatory promises from Presidents Nixon and Bush were equally unfulfilled. In fact, national administrative government dramatically expanded under Nixon's watch with the enactment of the major environmental, labor, and health statutes that ushered in a new era of national social regulation. JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* 15, 20–22 (2016).

<sup>64</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>65</sup> See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 374–83 (2008); see also Dawn E. Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *IND. L.J.* 363, 383 (2003) (“Reagan sought not only to advance his vision of [limited national] government through policy choices and political discourse, but also to enshrine it in constitutional doctrine.”).

<sup>66</sup> Gillian E. Metzger, *Essay, Agencies, Polarization, and the States*, 115 *COLUM. L. REV.* 1739, 1741, 1752–57, 1774–77 (2015) [hereinafter Metzger, *Agencies, Polarization, and the States*].

<sup>67</sup> See, e.g., *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States (Day 3)*, S. COMM. ON THE JUDICIARY at 1:46:08 (Mar. 22, 2017), <https://www.judiciary.senate.gov/hearings/watch?hearingid=8325DA5C-5056-A066-6059-5FD8D312A9BB> [<https://perma.cc/L74Q-GK5M>] (statement of Sen. Hatch) (“I am troubled by the suggestion that skepticism of *Chevron* . . . means that one is somehow reflexively opposed to regulation. . . . After all, it's important to remember that *Chevron* deference first flourished as a reaction against liberal judges overturning the . . . actions of the Reagan Administration.”); Jeffrey A. Pojanowski, *Without Deference*, 81 *MO. L. REV.* 1075, 1091 (2016) (noting that conservative *Chevron* skepticism may be attributable to “conservative frustration with eight years of a Democratic administration, contrasted with enthusiasm for the doctrine at its outset in the Reagan years”).



unavoidable today for the country to function; the question is not whether an administrative state will exist, but rather what will be the scope and focus of its activities.<sup>68</sup> Many government programs are popular or lobbied for by well-connected interest groups;<sup>69</sup> even those clamoring vociferously for a rollback of national government, such as the Tea Party, are strongly committed to some features of modern administrative governance.<sup>70</sup> Moreover, Presidents need the administrative state to achieve their policy goals. This is as true of President Trump as of his predecessors: Trump's campaign promises of significant infrastructure development, growing the military, and a crackdown on immigration all entail administrative expansions.<sup>71</sup> Further, enactment of burdensome procedural constraints or legislation retracting deference would only serve to make the Trump Administration's efforts to repeal regulations significantly harder.<sup>72</sup> Instead, a more likely move — again following in the footsteps of Reagan and subsequent Presidents — would be for the Trump Administration to seek to achieve deregulation from within the executive branch, as it already has started to do.

But past experience in fact may not be a good guide, because the national political situation today differs in important ways from that of the 1980s. Most salient here is the alarming increase in political polarization, with the two parties significantly more ideologically divided from each other and more internally ideologically consistent than they were when Reagan was President.<sup>73</sup> Moreover, the divergence between the

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<sup>68</sup> Pojanowski, *supra* note 67, at 1075.

<sup>69</sup> See Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POL.* 143, 143–44 (1996); Lauren Etter & Greg Hitt, *Farm Lobby Beats Back Assault on Subsidies*, *WALL ST. J.* (Mar. 27, 2008, 11:59 PM), <https://www.wsj.com/articles/SB120657645419967077> [<https://perma.cc/5FU2-6Z3G>]; Robert Y. Shapiro & Greg M. Shaw, *Why Can't the Senate Repeal Obamacare? Because Its Policies Are Actually Popular*, *WASH. POST: MONKEY CAGE* (July 19, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/19/why-cant-the-senate-repeal-obamacare-because-its-actual-policies-are-popular/> [<https://perma.cc/ZLR6-TRUG>].

<sup>70</sup> SKOCPOL & WILLIAMSON, *supra* note 7, at 59–60 (noting that “Tea Party people know that Social Security, Medicare, and veterans’ programs are government-managed, expensive, and funded with taxes,” but support the programs because they feel the recipients have “earned” it).

<sup>71</sup> David Lewis, *Why Donald Trump Needs the “Administrative State” that Steve Bannon Wants to Destroy*, *WASH. POST: MONKEY CAGE* (Mar. 2, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/02/why-donald-trump-needs-the-administrative-state-that-steve-bannon-wants-to-destroy/> [<https://perma.cc/M32V-PKYM>]; Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, *NPR* (Feb. 23, 2017, 5:12 AM), <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill> [<https://perma.cc/SP5P-GNNZ>].

<sup>72</sup> See Vermeule, *supra* note 18.

<sup>73</sup> See Cynthia R. Farina, Essay, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 *COLUM. L. REV.* 1689, 1701–05 (2015) (noting increases in congressional polarization since the 1980s with current levels of polarization being the highest since the Civil War). Although some debate the extent of polarization, there is general agreement that polarization is strongly present at the level of party elites and party activists. See, e.g., *id.* at 1705–17 (describing debate and concluding that evidence shows polarization among party activists and members of Congress); Gary

parties is particularly stark when it comes to the role of government, with recent surveys indicating that Republicans and Republican-leaning independents strongly prefer a smaller government providing fewer services (74%), whereas Democrats and Democratic-leaning independents strongly prefer a bigger government with more services (65%).<sup>74</sup> This divide is plainly evident in Congress, where the barrier to the RAA's enactment is near-solid Democratic opposition in the closely split Senate, making it difficult for the RAA's backers to secure the necessary supermajority of sixty votes to overcome a Democratic filibuster. Were the makeup of the Senate to turn more Republican, or were the Senate to do away with the filibuster, the RAA might well be enacted — particularly if Republicans conclude (as Democrats did in 1946 with respect to the APA) that their control of the executive branch is likely to be limited and enactment of the RAA is thus in their long-term interests.<sup>75</sup>

### B. *The Judicial and Academic Attack*

The current judicial challenges to national administrative government fall into three general categories: separation of powers challenges; unconstitutional challenges with a separation of powers background; and other constitutional challenges. Academic scholarship sounds similar themes, albeit with more of an individual rights flavor.

1. *Separation of Powers*. — The separation of powers challenges can further be subdivided by subject matter, again into three groupings: presidential power, in particular presidential appointment and removal authority; administrative adjudication; and delegation of authority to the executive branch.

(a) *Presidential Power*. — So far, presidential power challenges have been the most successful, in part reflecting longstanding doctrinal uncertainty about the scope of the President's removal powers. In the 2010 case of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>76</sup> a 5–4 Court invalidated for-cause removal protections for members of the Public Company Accounting Oversight Board (PCAOB), an entity that oversees the accounting industry and whose members are appointed by the Securities and Exchange Commission (SEC). According to Chief Justice Roberts's majority opinion, because the members of the SEC also enjoyed for-cause removal protection, the

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C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 690–700 (2013) (describing polarization in Congress and arguing that it reflects increased polarization in party bases).

<sup>74</sup> *With Budget Debate Looming, Growing Share of Public Prefers Bigger Government*, PEW RES. CTR. (Apr. 24, 2017), <http://www.people-press.org/2017/04/24/with-budget-debate-looming-growing-share-of-public-prefers-bigger-government/>3/ [https://perma.cc/84JW-2JZX].

<sup>75</sup> McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180–83 (1999).

<sup>76</sup> 561 U.S. 477 (2010).

result was a double for-cause protection that eviscerated the President's control over the PCAOB and thereby impaired his ability to ensure that the laws be faithfully executed.<sup>77</sup> *Free Enterprise* has sparked a cottage industry of separation of powers challenges, including *PHH Corp. v. Consumer Financial Protection Bureau*,<sup>78</sup> in which a 2–1 panel of the D.C. Circuit invalidated the removal protections for the Director of the Consumer Financial Protection Bureau (CFPB), an agency newly created by the Dodd-Frank Wall Street Reform and Consumer Fairness Act (Dodd-Frank).<sup>79</sup> According to the panel decision, now vacated pending en banc review, the concentration of CFPB's significant powers in a single director, rather than a multimember commission such as other independent agencies, removed important checks on accumulated power and rendered the arrangement unconstitutional.<sup>80</sup>

Both *Free Enterprise*'s prohibition on double for-cause removal protection and *PHH Corp.*'s requirement that independent agencies be headed by multimember commissions represent new constitutional limits on Congress's power to fashion administrative arrangements. Both decisions in turn justified their results in part on the novelty of the administrative structures they confronted.<sup>81</sup> In *Free Enterprise*, Chief Justice Roberts's majority opinion maintained that "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action,<sup>82</sup> a principle on which the D.C. Circuit panel heavily relied in *PHH Corp.*<sup>83</sup> The constitutionally suspect character of administrative novelty was also emphasized by the Court in *NLRB v. Noel Canning*,<sup>84</sup> which provided the Supreme Court with its first occasion to interpret the meaning of the Recess Appointments Clause.<sup>85</sup> President Obama's actions underlying *Noel Canning* were novel; no President had previously made recess appointments during a pro forma session — nor, indeed, had pro forma sessions been used to stymie recess appointments before 2007.<sup>86</sup> In *Noel Canning*, Justice

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<sup>77</sup> *Id.* at 495–99.

<sup>78</sup> 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).

<sup>79</sup> Pub. L. No. 11–203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>80</sup> *PHH Corp.*, 839 F.3d at 16.

<sup>81</sup> Antinovelty has surfaced in a number of structural constitutional challenges of late. See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415–21 (2017).

<sup>82</sup> 561 U.S. at 505 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

<sup>83</sup> 839 F.3d at 22.

<sup>84</sup> 134 S. Ct. 2550 (2014).

<sup>85</sup> *Id.* at 2560; see U.S. CONST. art. II, § 2, cl. 3.

<sup>86</sup> Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1609, 1619–20 (2015); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 46 (2014).

Breyer’s majority opinion underscored the importance of historical practice in holding that President Obama’s unprecedented action fell outside the scope of the recess appointments power.<sup>87</sup> But on the same basis, the majority ruled that recess appointments can be used during intrasession recesses and to fill vacancies that already exist when the recess occurs, concluding these practices were by now long established and accorded with the purpose of the clause.<sup>88</sup> Here Justice Scalia, writing also for Chief Justice Roberts and Justices Thomas and Alito, disagreed that longstanding historical practice was clear and also challenged the majority’s reliance on twentieth-century historical practice as an abandonment of the Court’s constitutional responsibilities.<sup>89</sup>

Hence, in addition to rejecting administratively novel arrangements, at least three current members of the Court would appear to give little weight to the tenure of administrative arrangements in assessing their constitutionality.<sup>90</sup> This asymmetry — novelty can condemn an administrative arrangement, but lack of novelty can’t save it — displays a skepticism toward administrative government on the part of a sizeable group on the Court. Although no constitutional separation of powers challenges came before the Court in the 2016 Term, the question of historical practice surfaced in *NLRB v. SW General, Inc.*,<sup>91</sup> a case on the scope of the President’s power to fill vacancies under the Federal Vacancies Reform Act<sup>92</sup> (FVRA). Chief Justice Roberts wrote for the Court that the Act barred those who were nominated to a vacant office requiring Senate confirmation from serving in the same office in an acting capacity (with an exception for nominees who had previously served a set period as first assistants to the office at issue).<sup>93</sup> Ever since 1998, when the FVRA was enacted, both the Office of Legal Counsel and the General Accountability Office had read the Act’s prohibition as applying more narrowly.<sup>94</sup> Concluding “[h]istorical practice is too grand a

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<sup>87</sup> 134 S. Ct. at 2567, 2574.

<sup>88</sup> *Id.* at 2566–68. This approach to novelty marked a change from Justice Breyer’s approach in *Free Enterprise*. Dissenting there, Justice Breyer thought this novelty of no moment, emphasizing the variety of administrative structures and the importance of “flexibility needed to adapt statutory law to changing circumstances.” 561 U.S. 477, 520 (2010) (Breyer, J., dissenting); *see id.* at 514–20.

<sup>89</sup> *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring in the judgment).

<sup>90</sup> It seems quite likely that Justice Gorsuch would be of a similar view, given his approach to related separation of powers challenges. *See supra* notes 13–17 and accompanying text.

<sup>91</sup> 137 S. Ct. 929 (2017).

<sup>92</sup> 5 U.S.C. §§ 3345–3349 (2012).

<sup>93</sup> *SW General*, 137 S. Ct. at 932.

<sup>94</sup> *See id.* at 943; Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) (interpreting the FVRA’s ban as applying only when a first assistant became an acting officer before serving the requisite ninety-day period, but not applying to other officers the FVRA made eligible to serve in an acting capacity).

title for [this] evidence,” Roberts rejected the relevance of these past interpretations without calling *Noel Canning* into question.<sup>95</sup> The most extreme claim in *SW General* was made by Justice Thomas, who argued in a concurrence that the Constitution likely prohibited any non-Senate-confirmed appointment to a principal officer position, even in an acting capacity.<sup>96</sup>

(b) *Administrative Adjudication.* — *Free Enterprise* has also surfaced in the administrative adjudication context, with a number of cases challenging the appointment and removal processes for administrative law judges (ALJs) at the SEC. Defendants facing administrative enforcement proceedings as a result of Dodd-Frank’s expansion of the SEC’s adjudication authority have argued that the ALJs presiding over their proceedings are inferior officers.<sup>97</sup> Under governing statutes, ALJs are competitively selected by the Office of Personnel Management (OPM), with agencies choosing an ALJ to hire from the three highest-scoring names on a list that OPM compiles.<sup>98</sup> By SEC rule, the agency’s chief ALJ selects which of these three candidates to hire — an arrangement that all concede would be unconstitutional if ALJs were indeed inferior officers, given the requirement that inferior officers be selected by the President (with or without Senate confirmation), heads of department, or courts of law.<sup>99</sup> Moreover, ALJs enjoy elaborate independence protections. Those protections include not only strong salary and for-cause removal protection for themselves, but also removal only after a formal on-the-record hearing by the Merit Systems Protection Board, the members of which also enjoy for-cause removal protection.<sup>100</sup> These

<sup>95</sup> *SW General*, 137 S. Ct. at 943 (internal quotation marks omitted).

<sup>96</sup> *Id.* at 948–49 (Thomas, J., concurring).

<sup>97</sup> *See, e.g.*, *Bandimere v. SEC*, 844 F.3d 1168, 1171 (10th Cir. 2016); *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 289 (D.C. Cir. 2016), *aff’d by an equally divided en banc court*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (per curiam); *Hill v. SEC*, 825 F.3d 1236, 1239 (11th Cir. 2016); *Duka v. SEC*, 103 F. Supp. 3d 382, 393 (S.D.N.Y. 2015).

<sup>98</sup> *See* 5 U.S.C. §§ 3317–3318 (2012); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).

<sup>99</sup> *See* 17 C.F.R. § 200.30-10(a)(2) (delegating to the Chief ALJ the power “[t]o designate administrative law judges”); *see also* Barnett, *supra* note 98, at 800 (“If . . . ALJs are ‘inferior Officers’ (not mere employees), the manner in which some are currently selected is likely unconstitutional.”). Appointment Clause problems may exist even in other agencies where the agency head does select the ALJs, given OPM’s role in limiting the pool of ALJ candidates and the fact that some agency heads may not qualify as department heads for constitutional purposes because their agencies are nested within bigger administrative entities. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010) (“[A] freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a ‘Department[t]’ for the purposes of the Appointments Clause.” (second alteration in original)); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. (forthcoming 2018) (Mar. 2017 draft at 64–68) (on file with the Harvard Law School Library).

<sup>100</sup> *See, e.g.*, 5 U.S.C. § 5335 (setting pay schedule for permanent employees, including ALJs); *id.* § 5362 (protecting permanent employees from pay decreases); *id.* § 7521 (establishing procedures to be followed before adverse action can be taken against an ALJ); *see also id.* § 1202(d) (providing

protections are a core feature of the current system for administrative adjudication under the APA, which combines initial adjudication by an ALJ with de novo review at the agency head level.<sup>101</sup> As a result, if ALJs are inferior officers, not only would the current systems many agencies use to appoint them be at odds with the Appointments Clause,<sup>102</sup> but also these removal protections might well run afoul of *Free Enterprise's* double for-cause bar.<sup>103</sup>

Whether or not this challenge to ALJ appointment ultimately proves successful in court, the mere fact that such a long-established feature of the national administrative state is under question is striking. This point is only more true with respect to the other constitutional attacks on administrative adjudication now being raised, such as the claim that such adjudication violates the Seventh Amendment jury trial right and claims that the combination of adjudicatory, prosecutorial, and enforcement powers in an agency violates due process.<sup>104</sup> The Roberts Court's position on these challenges is hard to read. In other contexts, the Chief Justice has worried about agencies wielding a combination of de facto legislative, executive, and adjudicatory power.<sup>105</sup> In addition, a majority of the Court has indicated some resistance to non–Article III jurisdiction, invalidating bankruptcy court jurisdiction over state law private right counterclaims in *Stern v. Marshall*.<sup>106</sup> Subsequently, in *Wellness International Network, Ltd. v. Sharif*,<sup>107</sup> the Chief Justice, writing for himself and two other Justices, strongly dissented over what he perceived as a rollback from *Stern*. He insisted that “[w]ith narrow exceptions, Congress may not confer power to decide federal cases and

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that any member of the Merit Systems Protection Board “may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office”).

<sup>101</sup> See *id.* § 556(b)(3) (providing that an ALJ may preside over the taking of evidence); *id.* § 557(b) (providing that the presiding employee shall make an initial decision, binding on the agency unless appealed).

<sup>102</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>103</sup> However, *Free Enterprise's* express reservation of its import for ALJs, 561 U.S. at 507 n.10, suggests that the Court may be unwilling to invalidate double for-cause removal in the adjudicatory context, and precedent going back to *Myers v. United States*, 272 U.S. 52 (1926), suggests that constitutional requirements of presidential control are different when adjudication is at issue, *id.* at 135.

<sup>104</sup> See, e.g., Complaint at 12–13, *Chau v. SEC*, 72 F. Supp. 3d 417 (S.D.N.Y. 2014) (No. 14-cv-1903); Complaint at 7–8, *Jarkesy v. SEC*, 48 F. Supp. 3d 32 (D.D.C. 2014) (No. 14-1114); Complaint at 13–23, *Bebo v. SEC*, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015) (No. 15-C-3). The influx of litigation challenging the administrative adjudicatory practices at the SEC has been attributed in part to the increase in power of SEC ALJs brought on by Dodd-Frank. See David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1190–210 (2016) (discussing possible infirmities of SEC ALJ adjudication).

<sup>105</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting).

<sup>106</sup> 564 U.S. 462 (2011).

<sup>107</sup> 135 S. Ct. 1932 (2015).

controversies upon judges who do not comply with the structural safeguards of Article III.”<sup>108</sup> On the other hand, the *Stern* majority expressly stated it was not reaching broader questions of administrative adjudication, acknowledged that public rights do not require Article III adjudication, and appeared to sanction a broad definition of public rights as rights that are “integrally related to particular Federal Government action.”<sup>109</sup> In addition, the Court’s return to a more flexible approach to Article III’s requirements in *Wellness International Network* perhaps signals some hesitancy to disrupt existing arrangements that significantly.<sup>110</sup>

The 2017 Term may well shed light on how far the Roberts Court is willing to pull back on administrative adjudication. A circuit split now exists on the question of whether SEC ALJs are inferior officers or employees, and thus also on the constitutionality of SEC adjudications.<sup>111</sup> And the Court has already granted certiorari in a case challenging whether the Patent and Trademark Office’s inter partes review of the validity of existing patents violates Article III and the Seventh Amendment.<sup>112</sup>

(c) *Delegation.* — In *Department of Transportation v. Ass’n of American Railroads*,<sup>113</sup> the D.C. Circuit invalidated a statutory scheme for improving passenger rail service on the grounds that it contained a delegation of regulatory power to private hands that violated due process and the separation of powers.<sup>114</sup> Given that the ostensibly private hands at issue were those of Amtrak, a statutorily denominated private corporation that the Supreme Court had previously found to be a governmental actor for constitutional purposes — as well as the Supreme Court’s consistent unwillingness to invalidate delegations as unconstitutional — the Court’s subsequent rejection of the D.C. Circuit’s private delegation holding was predictable.<sup>115</sup> Far less expected, however, were

<sup>108</sup> *Id.* at 1951 (Roberts, C.J., dissenting).

<sup>109</sup> 564 U.S. at 490–91.

<sup>110</sup> *See* 135 S. Ct. at 1944–46.

<sup>111</sup> Compare *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (holding SEC ALJs to be constitutionally hired employees), *aff’d by an equally divided en banc court*, No. 15-1345, 2017 WL 2727019 (D.C. Cir. June 26, 2017) (per curiam), and *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), with *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) (holding SEC ALJs to be unconstitutionally appointed inferior officers), and *Burgess v. FDIC*, No. 17-60579, 2017 WL 3928326 (5th Cir. Sept. 7, 2017).

<sup>112</sup> *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 639 F. App’x 639 (Fed. Cir. 2016) (mem.) (per curiam), *cert. granted*, 137 S. Ct. 2239 (2017) (mem.).

<sup>113</sup> 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015), *aff’d on reh’g*, 821 F.3d 19 (D.C. Cir. 2016).

<sup>114</sup> *Id.* at 677.

<sup>115</sup> *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1232–35; *see also* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 492 (2001) (rejecting unconstitutional delegation holding below).

the “concurrences” of Justices Alito and Thomas. Both Justices expressed concern that delegations make lawmaking too easy and threaten individual liberty.<sup>116</sup> Justice Alito mainly targeted the possibility that required performance standards for Amtrak might be set by binding arbitration using an arbitrator appointed by the federal Surface Transportation Board.<sup>117</sup> In his view, this possibility likely rendered the scheme unconstitutional: if a private arbitrator were used, the scheme would violate what he posited as a categorical constitutional ban on private delegations; and if the arbitrator were public, the fact that her decisions would be binding meant that she was a principal officer who had to be appointed by the President.<sup>118</sup> Meanwhile Justice Thomas, concurring only in the judgment, offered a broad-ranging disquisition on the original understanding of separation of powers and the unconstitutionality of modern-day delegations of regulatory authority. Condemning the reigning intelligible principle test as failing to prevent delegation of legislative power, Justice Thomas advocated “return[ing] to the original understanding of the federal legislative power,” which would “require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process” and deny the executive “*any* degree of policy judgment” in establishing such rules.<sup>119</sup> Concurring this Term in an otherwise-unanimous case on preemption, Justice Thomas reiterated his attack on delegation, stating that a “statute that confers on an executive agency the power to enter into contracts that pre-empt state law . . . might unlawfully delegate legislative power to the President insofar as the statute fails sufficiently to constrain the President’s contracting discretion.”<sup>120</sup>

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<sup>116</sup> *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring) (“The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability check-points.” (citing *INS v. Chadha*, 462 U.S. 919, 959 (1983))); *id.* at 1245 (Thomas, J., concurring in the judgment) (“At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.”).

<sup>117</sup> Justice Alito also attacked the method for appointing Amtrak’s president; he argued that the president was a principal officer requiring presidential appointment, and further contended that, even if Amtrak’s president were an inferior officer, Amtrak was likely not a department, so the president’s selection by the Amtrak board was still unconstitutional. *See id.* at 1239–40 (Alito, J., concurring).

<sup>118</sup> *Id.* at 1235–39.

<sup>119</sup> *Id.* at 1246, 1251 (Thomas, J., concurring in the judgment).

<sup>120</sup> *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1199 (2017) (Thomas, J., concurring). While Justice Gorsuch took no part in the consideration or decision of *Coventry Health Care*, he previously expressed a similar view. *See* Gorsuch, *supra* note 13, at 914–15 (criticizing the blend of executive power with delegated legislative and judicial power that characterized the *De Niz Nobles* case); *see also* Bazelon & Posner, *supra* note 17 (“Judge Gorsuch is skeptical that Congress can use broadly written laws to delegate authority to agencies in the first place.”).



Broad delegations of policymaking power represent the backbone of the modern administrative state, and reliance on private actors for governmental functions is also a major trend.<sup>121</sup> Hence, a centrally important feature of the Court's *American Railroads* decision is the fact that both Justices wrote singly; all the other Justices did was overturn the D.C. Circuit's private delegation holding and remand the appointments and due process claims for that court to consider in the first instance.<sup>122</sup> This fact did not lead the D.C. Circuit to change its tune, however. On remand the same panel of the D.C. Circuit essentially reinstated the logic of its earlier decision by holding that Amtrak was an economically self-interested entity, even if governmental, and allowing such an entity to exercise regulatory power over its competitors for track time violated due process.<sup>123</sup>

2. *Subconstitutional Doctrines and the Separation of Powers.* — More members on the Court have signaled some support for Justice Thomas's concerns about delegation when advanced indirectly — as a basis for pulling back on judicial deference to agencies — rather than as a frontal constitutional assault.<sup>124</sup> So far, only two Justices have concluded that *Chevron* deference to agency statutory interpretations is unconstitutional,<sup>125</sup> though several more are willing to limit *Chevron*'s scope.<sup>126</sup> Even more have signaled their willingness to dispense with judicial deference to agency interpretations of their own regulations — deference which is reflected in the line of cases from *Bowles v. Seminole*

<sup>121</sup> Gillian E. Metzger, *Delegation, Accommodation, and the Permeability of Constitutional and Ordinary Law*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 409, 410 (Mark Tushnet et al. eds., 2015).

<sup>122</sup> *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233–34.

<sup>123</sup> *Ass'n of Am. R.Rs. v. U.S. Dep't. of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016). The panel also agreed with Justice Alito that the arbitrator was an unconstitutionally appointed principal officer. *Id.* at 38–39. The D.C. Circuit denied the government's petition for en banc review, and the government opted to not seek certiorari. *Ass'n of Am. R.Rs.*, No. 12-5204 (D.C. Cir. Sept. 9, 2016) (mem.) (per curiam).

<sup>124</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring) (Justice Alito joined Chief Justice Roberts's opinion); *id.* at 616 (Scalia, J., concurring in part and dissenting in part); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>125</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (“These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.”); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) (“But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.”); see also *Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment) (noting *Chevron*'s problematic basis but justifying it as “in conformity with the long history of judicial review of executive action”).

<sup>126</sup> See *supra* note 124 and accompanying text.

*Rock & Sand Co.*<sup>127</sup> through *Auer v. Robbins*.<sup>128</sup> Although such retraction in deference is justified in part by reference to the language of the APA, separation of powers concerns are also frequently invoked. Hence, for example, Justice Scalia maintained that deferring to agency interpretations of their own rules “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”<sup>129</sup>

These attacks on deference are of very recent vintage. It was just twenty years ago, in 1997, when Justice Scalia penned *Auer* for a unanimous Court and reaffirmed that courts defer to agency interpretations of their own regulations “unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>130</sup> In the 2016 Term, the Court came close to deciding a case that raised questions about the scope of *Auer* deference. In *G.G. ex rel. Grimm v. Gloucester County School Board*,<sup>131</sup> the Fourth Circuit deferred to guidance from the Departments of Education and Justice interpreting Title IX and a Department of Education (DOE) regulation as requiring the Gloucester County School Board to allow G.G. access to the boys’ bathroom at his school.<sup>132</sup> Although declining the School Board’s request to reconsider *Auer* deference writ large, the Court granted certiorari on the question of whether deference to the specific guidance at issue was appropriate.<sup>133</sup> When the Trump Administration

<sup>127</sup> 325 U.S. 410 (1945).

<sup>128</sup> 519 U.S. 452 (1997). Justices Thomas and Alito have indicated that they believe *Auer* may well be incorrect and should be reconsidered, which was also Justice Scalia’s view. See *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); see also *id.* at 1212–13 (Scalia, J., concurring in the judgment). Justice Gorsuch’s view that *Chevron* deference is unconstitutional and violates the APA strongly suggests he would take a similar stance on *Auer* deference. See *Gutierrez-Brizuela*, 834 F.3d at 1152–55 (Gorsuch, J., concurring). In addition, Chief Justice Roberts signaled his willingness to revisit *Auer* in an appropriate case, see *Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring), but also joined the majority opinion in *Perez*, which treated *Auer* as good law — albeit emphasizing the limited scope of *Auer* deference as it did so, 135 S. Ct. at 1208 n.4.

<sup>129</sup> *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part); see also *Perez*, 135 S. Ct. at 1216–21 (Thomas, J., concurring in the judgment); *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

<sup>130</sup> *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

<sup>131</sup> 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

<sup>132</sup> *Id.* at 715. The Department of Education letter at issue provided that, in situations where sex segregation is allowed in schools, such as in bathrooms under 34 C.F.R. § 106.33 (2016), “transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.” Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Justice 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/K6K9-Q3NL>].

<sup>133</sup> Petition for a Writ of Certiorari at i, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (No. 16-273) (presenting the questions: (1) should the Court retain *Auer* deference, (2) is *Auer* deference appropriate for the guidance document at issue, and (3) is the DOE guidance appropriate); *Gloucester County*, 137 S. Ct. at 369 (granting certiorari on questions (2) and (3)).

rescinded the guidance, however, the Court simply remanded the case back to the Fourth Circuit to reconsider the issue without reaching the merits.<sup>134</sup> Despite the Court's failure this Term to act on *Gloucester County* or other cases raising *Auer* deference,<sup>135</sup> continuing controversy suggests that the Court will likely address *Auer*'s scope and propriety in coming Terms.

Even more striking than the attacks on *Auer* are judicial efforts to overturn the longstanding deference to agency statutory interpretations provided under the *Chevron* framework. Newly minted Justice Gorsuch emerged this year as a pointed critic of *Chevron*. In a series of opinions on the Tenth Circuit, then-Judge Gorsuch attacked *Chevron* deference as at odds with the separation of powers:

*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. . . . *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. . . . When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct. . . . Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more.<sup>136</sup>

Although *Chevron* has certainly sparked its share of criticism over the years, such a frontal constitutional assault on *Chevron* in a judicial opinion is a relative novelty. Indeed, in 2005 Justice Thomas — who now agrees *Chevron* is unconstitutional — wrote a majority opinion for the Court holding that under *Chevron* a lower court must defer to agency interpretations of ambiguous statutes, even if the court had already interpreted the statute differently in another context.<sup>137</sup>

Other Justices have pursued a more modest attack on *Chevron*. For example, in *King v. Burwell*<sup>138</sup> a majority signed on to Chief Justice Roberts's opinion summarily rejecting the *Chevron* framework in interpreting an admittedly ambiguous statute, on the grounds that at issue

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<sup>134</sup> *Gloucester County*, 137 S. Ct. at 1239.

<sup>135</sup> See, e.g., *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari); *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 618 (2017); *Diamond Sawblades Mfrs. Coal. v. Hyosung D & P Co.*, 809 F.3d 626 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 1325 (2017); *Noble Energy, Inc. v. Jewell*, 650 F. App'x 9 (D.C. Cir. 2016) (*per curiam*), *cert. denied sub nom. Noble Energy, Inc. v. Haugrud*, 137 S. Ct. 1327 (2017).

<sup>136</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring); see also *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 969 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

<sup>137</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

<sup>138</sup> 135 S. Ct. 2480 (2015).

was “a question of deep ‘economic and political significance’ that [was] central to th[e] statutory scheme.”<sup>139</sup> Strongly dissenting in *City of Arlington v. FCC*,<sup>140</sup> the Chief Justice, joined by Justices Kennedy and Alito, argued that courts failed to perform their constitutional and statutory duties if they deferred to agency jurisdictional determinations.<sup>141</sup> In addition, several decisions have read statutes aggressively to discern a plain meaning at odds with the agencies’ interpretations,<sup>142</sup> displayed increasing skepticism about changed agency interpretations,<sup>143</sup> and read procedural restrictions on agencies expansively.<sup>144</sup> Justice Gorsuch has also offered cabining principles, holding for the Tenth Circuit that *Chevron* does not apply when an agency issues a new rule in an adjudication<sup>145</sup> and similarly that agency interpretations of ambiguous provisions apply prospectively, at least when the agency’s interpretations are at odds with existing judicial interpretations.<sup>146</sup>

Far too many judicial decisions sustain administrative actions on deferential review to identify a clear move toward rejecting *Chevron*.<sup>147</sup> The Supreme Court has also rebuffed lower court efforts to impose procedural requirements on agencies’ ability to promulgate new statutory interpretations beyond those mandated by Congress.<sup>148</sup> But combined with the various lines of constitutional attack on administrative action

<sup>139</sup> *Id.* at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

<sup>140</sup> 569 U.S. 290 (2013).

<sup>141</sup> *Id.* at 314–16 (Roberts, C.J., dissenting).

<sup>142</sup> *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015) (rejecting agency interpretation as unreasonable under *Chevron*’s deferential second step); *Texas v. United States*, 809 F.3d 134, 179–87 (5th Cir. 2015) (concluding from express statutory authorization of certain immigration relief that plain text of statute prohibited agency’s interpretation of statute as allowing additional relief), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam); *see also Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (underscoring importance of *Chevron*’s first step).

<sup>143</sup> *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (finding a change in agency interpretation arbitrary and capricious because the agency inadequately explained why the interpretation was changed); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (noting that it is arbitrary and capricious to change an interpretation that has been relied upon without explaining why). *But see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (holding that not all changes in agency interpretation need be justified by reasons more substantial than those required to adopt an interpretation in the first instance).

<sup>144</sup> *See Texas v. United States*, 809 F.3d at 170–78 (finding that promulgation of an alleged guidance document was procedurally defective because it was not submitted for notice and comment).

<sup>145</sup> *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171–72 (10th Cir. 2015).

<sup>146</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144–49 (10th Cir. 2016).

<sup>147</sup> Indeed, Professor Adrian Vermeule recently argued that courts are moving toward greater deference. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 157–58 (2016).

<sup>148</sup> *See Perez*, 135 S. Ct. at 1206 (rejecting additional procedural requirements for changed agency interpretations); *see also FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782–84 (2016) (rejecting the D.C. Circuit’s contention that FERC did not adequately engage with reasonable arguments against the adopted rule).

and the Court's at times strong anti-administrative rhetoric, these statements questioning deference contribute to the sense of a growing judicial resistance to administrative governance and judicial concern over the constitutional legitimacy of the administrative state.

3. *Other Constitutional Claims.* — Finally, the Supreme Court and lower courts have also cut back on administrative governance by constitutional means other than separation of powers. In recent years, the Roberts Court has expanded First Amendment protections in ways that pose challenges to major regulatory schemes.<sup>149</sup> This antiregulatory tilt is particularly evident with respect to corporate speech and speech in economic contexts, including most prominently the First Amendment invalidation of bans on direct corporate election spending in *Citizens United v. FEC*.<sup>150</sup> It is also demonstrated by the D.C. Circuit's protection of employers' refusals to post statements of workers' statutory rights to organize<sup>151</sup> and the Supreme Court's protections for corporate access to information for drug marketing.<sup>152</sup> A similar phenomenon has occurred in relation to religion, with regulatory requirements being significantly pared back in the name of religious free exercise.<sup>153</sup>

Both of these trends were on display in the 2016 Term. *Expressions Hair Design v. Schneiderman*<sup>154</sup> involved a challenge by merchants to a New York statute that precluded them from imposing a surcharge on consumers who pay by credit card; the merchants claimed that the statute violated their First Amendment rights by regulating how they communicate their prices.<sup>155</sup> The Court did not reach the question of whether the statute actually violated the First Amendment; instead it simply found that the statute regulated speech and remanded for the

<sup>149</sup> See Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. no. 4, 2014, at 195, 198–203. See generally Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 178–82. As Professor Jeremy Kessler has described, these First Amendment challenges to economic regulation have a long history over the twentieth century. See Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1941–76 (2016).

<sup>150</sup> 558 U.S. 310 (2010).

<sup>151</sup> See Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

<sup>152</sup> Sorrell v. IMS Health Inc., 564 U.S. 552, 571–80 (2011).

<sup>153</sup> See, e.g., Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–85 (2014) (invalidating on religious freedom grounds regulations requiring employers to provide health insurance with coverage for contraceptive drugs); see also Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1466–71 (2015). Although constitutionally infused, these decisions are often based on the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012), rather than direct constitutional free exercise claims. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2759.

<sup>154</sup> 137 S. Ct. 1144 (2017).

<sup>155</sup> *Id.* at 1146–48.

Second Circuit to assess its constitutionality in the first instance.<sup>156</sup> The Court was somewhat more forthcoming in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,<sup>157</sup> where by a 7–2 vote it ruled that Missouri’s refusal to allow a church to participate in a government-subsidized playground resurfacing program violated the Free Exercise Clause.<sup>158</sup> But the majority limited its holding to express discrimination in the context of playground resurfacing — an oddly specific limit, but one that avoided reaching questions of more religious uses or other types of government funding, and also served to secure Justice Breyer’s vote.<sup>159</sup>

In other individual rights contexts, however, the Roberts Court’s willingness to overturn regulatory schemes has been more muted. Of particular note, other than protection of commercial and corporate speech, the Roberts Court has not indicated much interest in revitalizing individual economic rights doctrines in a way that would force a significant curtailment in government regulation. For example, the Court has shown little interest in reviving direct economic due process protection of the *Lochner*<sup>160</sup> variety. It has also proceeded cautiously on the takings front, invalidating a longstanding agricultural marketing arrangement, but on grounds that accord with well-established doctrine and yielded broad support among the Justices.<sup>161</sup> This Term’s decision in *Murr v. Wisconsin*<sup>162</sup> continued this restrained stance, with Justice Kennedy’s 5–3 opinion insisting that regulatory takings analysis must be flexible to balance individual property rights with the government’s power to regulate, and therefore rejecting a categorical rule that property lot boundaries must define the extent of property for takings purposes.<sup>163</sup> Although *Murr* provoked a dissent by Chief Justice Roberts that Justices Thomas and Alito joined, the dissent expressly limited its objections to the majority’s methodology, stating that the majority’s finding of no taking was not troubling and that the type of zoning ordinance at issue “is

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<sup>156</sup> *Id.* at 1147; *see also* *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (invalidating statutory prohibition on registration of trademarks that disparage persons or bring them into contempt or disrepute as violating the First Amendment).

<sup>157</sup> 137 S. Ct. 2012 (2017).

<sup>158</sup> *Id.* at 2024–25.

<sup>159</sup> *Id.* at 2024 n.3; *see also id.* at 2026–27 (Breyer, J., concurring in the judgment). The Court will confront a Free Exercise challenge next Term that lacks express discrimination against religion and also involves government regulation rather than government benefits. *See* *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276–77 (Colo. App. 2015), *cert. granted sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 127 S. Ct. 2290 (2017) (mem.).

<sup>160</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>161</sup> *See* *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015); *see also* *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010) (upholding Florida’s Beach and Shore Preservation Act against takings challenge).

<sup>162</sup> 137 S. Ct. 1933 (2017).

<sup>163</sup> *Id.* at 1944–47.

a commonplace tool to preserve scenic areas . . . for the benefit of landowners and the public alike.”<sup>164</sup>

Instead of developing economic rights directly, the Court has turned to constitutional surrogates to limit economic regulation — the First Amendment claims identified above<sup>165</sup> and also federalism limits to the scope of national authority. The prime example of the latter move is *NFIB v. Sebelius*,<sup>166</sup> where the Court ruled that Congress’s commerce power did not extend to requiring individuals to buy health insurance, although it ultimately upheld the Affordable Care Act’s individual mandate as a tax.<sup>167</sup> A prohibition on congressional regulation of inaction is unlikely to have much import in practice, given the rarity of such regulatory regimes and the ease with which inaction usually can be reformulated as action — not to mention a majority’s willingness to allow Congress to rely on its taxing power to similar effect. Thus, *NFIB* suggests the Roberts Court’s hesitancy to pull back significantly on national regulatory power.<sup>168</sup> Yet the fact that the Court came close to invalidating the most significant national social welfare program in a generation, and asserted constraints on the spending power for the first time, again indicates the extent to which judicial views on national power may be changing.

Moreover, several lower court judges have given voice to strong off-the-court libertarian attacks on administrative government,<sup>169</sup> as well as occasional on-the-court diatribes. Perhaps the most dramatic of the latter was Judge Brown’s concurrence in *Hettinga v. United States*,<sup>170</sup> joined by Judge Sentelle, invoking “the gap between the rhetoric of free markets and the reality of ubiquitous regulation” and characterizing regulation of a dairy farmer as “impermissibl[e] collectiviz[ation],” despite concluding the statute at issue was sanctioned by a long line of constitutional adjudication.<sup>171</sup> Similar sharp libertarian statements appear at other levels of government, with Texas Supreme Court Justice Willett

<sup>164</sup> *Id.* at 1950 (Roberts, C.J., dissenting).

<sup>165</sup> See *supra* notes 149–59 and accompanying text.

<sup>166</sup> 567 U.S. 519 (2012).

<sup>167</sup> *Id.* at 574–75; see also Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 277–84 (2012) (arguing that the NFIB challengers relied on federalism arguments as a proxy for debunked Lochnerian substantive due process).

<sup>168</sup> See Gillian E. Metzger, *The Supreme Court, 2011 Term — Comment: To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 112–16 (2012) (“[I]t is not at all clear that there is substantial sentiment on the Court for curbing the national government in favor of the states.”).

<sup>169</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 403–06 (2015) (describing speeches from Judges Ginsburg and Brown on the D.C. Circuit).

<sup>170</sup> 677 F.3d 471 (D.C. Cir. 2012).

<sup>171</sup> *Id.* at 480 (Brown, J., concurring); see also *Ass’n of Am. R.Rs. v. Dep’t of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016) (“The Constitution’s drafters may not have foreseen the formidable prerogatives of the administrative state . . .”).

describing a state constitutional challenge to a hair braider licensing requirement as being “about whether government can connive with rent-seeking factions to ration liberty unrestrained.”<sup>172</sup>

4. *Academic Attacks.* — This growing judicial resistance to administrative government is supported by increasing academic attacks on the constitutional legitimacy of administrative government. To be sure, academic complaints about the current scope of national regulatory power are well established,<sup>173</sup> and some scholars have long alleged that the modern national administrative state is fundamentally at odds with the Constitution.<sup>174</sup> But these administrative challenges have expanded in scope and become more prominent in academic debates over the separation of powers.<sup>175</sup> The most extreme example of this trend is perhaps Professor Philip Hamburger’s *Is Administrative Law Unlawful?*<sup>176</sup> In Hamburger’s portrayal, administrative government is the modern incarnation of the royal prerogative overturned in Britain at the end of the seventeenth century: Agencies unlawfully engage in legislation and adjudication, and the combination of these functions in agencies yields consolidated and absolute power.<sup>177</sup> The “Constitution in Exile” movement, with its attacks on contemporary delegation and commerce power doctrine as deviating from the original constitutional plan, was an early manifestation of the current academic anti-administrative trend.<sup>178</sup>

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<sup>172</sup> *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J., concurring). In September 2017, President Trump nominated Justice Willett to serve as a circuit judge on the U.S. Court of Appeals for the Fifth Circuit. Kyle Swenson, *Trump Wants Texas’s “Tweeter Laureate” Judge on Federal Appeals Court*, WASH. POST (Sept. 29, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/09/29/trump-wants-texas-twitter-laureate-judge-on-federal-appeals-court/> [<https://perma.cc/R6M5-WRS>].

<sup>173</sup> See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

<sup>174</sup> For a particularly effective statement of these arguments, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–49 (1994).

<sup>175</sup> See Sunstein & Vermeule, *supra* note 8, at 46–47.

<sup>176</sup> Hamburger answers this question with a resounding “Yes.” See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). For a critique and an equally resounding “No,” see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra*). See also Paul P. Craig, *The Legitimacy of U.S. Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 2–4 (Univ. of Oxford Legal Research Series, Paper No. 44, 2016), <https://ssrn.com/abstract=2802784> [<https://perma.cc/M8UY-VAJ5>].

<sup>177</sup> HAMBURGER, *supra* note 176, at 26–29.

<sup>178</sup> Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)) (“So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses.”).



Like the judicial attacks, scholars also target specific features of administrative governance as unconstitutional, such as delegation<sup>179</sup> and administrative adjudication.<sup>180</sup> Interestingly, although Reagan-era attacks on administrative governance challenged restrictions on presidential authority as unconstitutional,<sup>181</sup> some anti-administrative scholars are now sounding alarms about burgeoning presidential power.<sup>182</sup>

Academic attacks on administrative governance additionally parallel judicial attacks in combining full-bore constitutional assaults with more moderate interventions. Surrounding these constitutional attacks is a growing body of legal academic work pushing back at administrative governance more incrementally, often through administrative law.<sup>183</sup> A particular area of focus is *Chevron* deference, which conservative scholars condemn as unconstitutionally biased in the government's favor and violating Article III as well as the APA.<sup>184</sup> A notable difference between judicial and academic anti-administrativism, however, is the strong libertarian edge to anti-administrative scholarship. Professors Randy Barnett, David Bernstein, and Richard Epstein, in particular, have prominently critiqued national regulation for exceeding constitutional bounds and violating individual rights, as part of a broader effort to revive *Lochner* and libertarian constitutionalism.<sup>185</sup>

The recent spurt of anti-administrative scholarship is in part a response to the Obama Administration's expansive use of executive power

<sup>179</sup> See, e.g., Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 491–93 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 353–77 (2002).

<sup>180</sup> See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016).

<sup>181</sup> See Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628–29 (1989).

<sup>182</sup> See Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. (forthcoming) (manuscript at 3–5) (on file with the Harvard Law School Library); see also F.H. BUCKLEY, *THE ONCE AND FUTURE KING* 12–15 (2014). On the compatibility of these two views, see John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J.F. 374 (2017).

<sup>183</sup> See, e.g., Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 178–83 (2016) (advocating adoption of the REINS Act, cost-benefit analyses in rulemaking, and a fifteen-year sunset on major rules); Ginsburg & Menashi, *supra* note 179, at 477 (“[O]ur administrative law doctrines have drifted . . . far from the liberal tradition.”); Nielson, *supra* note 44 (arguing for expanded use of formal rulemaking procedures); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1575–76 (2013) (arguing for stricter judicial policing of agency reasoning and determinations when agencies adjudicate private rights); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017) (arguing against more restrictive remedial rules).

<sup>184</sup> See Ginsburg & Menashi, *supra* note 179, at 497–507; Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016); see also CHARLES MURRAY, *BY THE PEOPLE* 69–71 (2015).

<sup>185</sup> See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014).

in a progressive and proregulatory direction.<sup>186</sup> But these academic moves reflect a longer-term and more lasting development. They are part of a wider and decades-old effort to reset constitutional law in a conservative and libertarian direction, reflected in the work of conservative legal groups like the Federalist Society and the Institute for Justice.<sup>187</sup> As that suggests, there is a mutually reinforcing relationship between judicial and academic attacks on the administrative state. Hamburger's volume gained prominence when it was repeatedly cited by Justice Thomas in his *American Railroads* concurrence,<sup>188</sup> while Barnett and other scholars have sought to advance their scholarly views through litigation, such as the constitutional challenge to the Affordable Care Act.<sup>189</sup> This parallel academic push thus makes the judicial anti-administrative turn seem more likely to intensify, particularly with appointments of judges with deep roots in the conservative legal movement.<sup>190</sup>

### C. Contemporary Anti-Administrativism's Core Themes

These attacks on the administrative state may seem on the surface a diverse lot. They encompass a range of measures and challenges, and even similar claims are advocated with varying degrees of moderation and extremity. Nor does support for these challenges necessarily signal antipathy to administrative government. One can favor greater presidential power over the administrative state while also supporting more active administration, for example.<sup>191</sup> Scholars committed to the administrative project have criticized executive branch excesses,<sup>192</sup> identified agency failures,<sup>193</sup> and long raised concerns about *Chevron*

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<sup>186</sup> See, e.g., DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015); BUCKLEY, *supra* note 182.

<sup>187</sup> See DECKER, *supra* note 63, at 39–50; Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), <https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal> [<https://perma.cc/ZB2P-9777>] (describing increased influence of libertarian scholars in conservative legal circles). See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

<sup>188</sup> 135 S. Ct. 1225, 1242–44 (2015) (Thomas, J., concurring in the judgment).

<sup>189</sup> See, e.g., BARNETT, *supra* note 185, at 1–18.

<sup>190</sup> See *supra* notes 19–20 and accompanying text.

<sup>191</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248–49, 2251–52 (2001).

<sup>192</sup> See, e.g., PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 3–5 (2009); William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 773–80.

<sup>193</sup> See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (detailing regulatory deficiencies at the National Highway Traffic Safety Administration); see also JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT*

deference.<sup>194</sup> Some proposed anti-administrative measures find favor across the political spectrum,<sup>195</sup> and many progressives are now turning to the courts to counter the Trump Administration's regulatory rollbacks, just as conservatives used litigation to resist the Obama Administration's proregulatory initiatives.<sup>196</sup>

Nonetheless, these current attacks evidence commonalities that justify their linkage as part of a distinct and emerging phenomenon. In particular, three key themes run throughout: a rhetorical and almost visceral resistance to an administrative government perceived to be running amok; a strong turn to the courts as the means to curb administrative power; and a heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers.<sup>197</sup> These underlying logics offer the conceptual frame that drives contemporary anti-administrativism, but they lack merit on examination.

1. *Rhetorical Anti-Administrativism.* — These political, judicial, and academic attacks stand out for their rhetorical antipathy to administrative government.<sup>198</sup> Such strident rhetoric is unsurprising in the political sphere, where bureaucracy bashing is nothing new. And although Hamburger's repeated insistence that administrative government is "unlawful," "extralegal," and "supralegal," and represents the "exercise of power outside and above the law"<sup>199</sup> is striking for academic

(1960) (analysis for newly elected President Kennedy of regulatory problems and failures, written by a central defender of the administrative state in the 1930s).

<sup>194</sup> See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) (arguing that *Chevron* deference is at odds with governing statutes, lacks a theoretical foundation, is inconsistently applied, and creates uncertainty); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 497–98, 520 (1989).

<sup>195</sup> As an example, Professor Cass Sunstein, the former head of the Office of Information and Regulatory Affairs (OIRA) under President Obama, has indicated his support for aspects of the RAA. See Sunstein, *supra* note 43.

<sup>196</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, Pub. Citizen, Inc. v. Trump, No. 1:17-cv-00253 (D.D.C. Feb. 8, 2017); Eli Savit, *The New Front in the Clean Air Wars: Fossil-Fuel Influence over State Attorneys General — And How It Might Be Checked*, 115 MICH. L. REV. 839, 855–57 (2017) (book review).

<sup>197</sup> Two other important connections are the shared network of lawyers, scholars, advocates, and funders that lies behind the current spate of attacks and the parallels to claims raised against administrative government in the 1930s, discussed below in Part II.

<sup>198</sup> Professor Edward Rubin has characterized this phenomenon as an "anti-administrative impulse," a "preanalytic hostility to the modern administrative state," and "an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times." Edward Rubin, Essay, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073–74 (2005).

<sup>199</sup> HAMBURGER, *supra* note 176, at 6–7. Similarly in this vein is Hamburger's recent short book titled *The Administrative Threat*. See PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 4 (2017) ("Administrative power is thus all about the evasion of governance through law,

commentary, diatribes against administrative government are no strangers to legal scholarship.<sup>200</sup>

Similar rhetorical excesses appear frequently in the Supreme Court's recent separation of powers and administrative law jurisprudence. Agency officials are overregulating "bureaucrats"<sup>201</sup> who seek to expand their authority by exploiting judicial deference<sup>202</sup> and who wield their broad delegated powers arbitrarily<sup>203</sup> or with the intent of advancing their own interests at the expense of the regulated public.<sup>204</sup> National administrative government consists of "hundreds of federal agencies poking into every nook and cranny of daily life"<sup>205</sup> as part of a "titanic administrative state."<sup>206</sup> This harsh condemnation of the federal government is unusual in Supreme Court jurisprudence and also appears to be a relatively recent development, largely dating back to Chief Justice Roberts's *Free Enterprise* opinion.<sup>207</sup> Often these judicial castigations of administrative government are unnecessary to the case at hand. A prime exemplar is Justice Gorsuch's broadside against agencies in *Gutierrez-Brizuela v. Lynch*<sup>208</sup> when he was still on the Tenth Circuit, which came in a concurrence to an opinion he himself had written.<sup>209</sup> But Justice Thomas is undoubtedly the king of the anti-administrative concurrence, having used the form to issue long discursions on the unconstitutionality of administrative governance on several occasions in recent years.<sup>210</sup>

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including an evasion of constitutional processes and procedural rights. These legal problems are forceful reasons to reject all administrative power and, indeed, to consider it the civil liberties issue of our time.”).

<sup>200</sup> See *supra* section I.B.4, pp. 31–33.

<sup>201</sup> *City of Arlington v. FCC*, 569 U.S. 290, 305 (2013) (“These lines will be drawn . . . by unelected federal bureaucrats . . .”).

<sup>202</sup> *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that courts sanctioned unconstitutional agency aggrandizement in stating: “[W]hen an agency interprets its own rules[,] . . . [t]hen the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly . . .” (emphasis omitted)).

<sup>203</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015).

<sup>204</sup> See *City of Arlington*, 569 U.S. at 313–15 (Roberts, C.J., dissenting); see also *Ass'n of Am. R.R.s. v. Dep't of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016) (“The specific fairness question we face here is whether an economically self-interested entity may exercise regulatory authority over its rivals.”).

<sup>205</sup> *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

<sup>206</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>207</sup> Although anti-administrative rhetoric certainly surfaced before *Free Enterprise*, many of the recent manifestations cite back to that decision. See, e.g., *Dep't of Transp. v. Ass'n of Am. R.R.s.*, 135 S. Ct. 1225, 1241, 1246, 1254 (2015) (Thomas, J., concurring in the judgment); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1218, 1221 (2015) (Thomas, J., concurring in the judgment); *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting).

<sup>208</sup> 834 F.3d 1142.

<sup>209</sup> See *id.* at 1149 (Gorsuch, J., concurring).

<sup>210</sup> See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 945 (2017) (Thomas, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Ass'n of Am. R.R.s.*, 135 S. Ct. at 1240

The rhetorical character of judicial anti-administrativism is reinforced by the sharp disconnect that often exists between the constitutional concerns invoked and the legal result reached. Take, for example, Chief Justice Roberts's statement in *City of Arlington* that "[t]he accumulation of . . . powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government. . . . [T]he danger posed by the growing power of the administrative state cannot be dismissed."<sup>211</sup> The logical inference from such language is that modern administrative government is systematically unconstitutional, yet all the Chief Justice sought was an exclusion of jurisdictional determinations from the ambit of *Chevron* deference.<sup>212</sup> Similarly, with the exception of Justice Thomas, anti-administrative Justices have largely kept to corraling administrative government at the edges, unwilling to significantly curtail key administrative phenomena such as delegations of power or administrative adjudication.<sup>213</sup>

As Professors Cass Sunstein and Adrian Vermeule have argued, these judicial attacks on administrative government "[a]t bottom . . . rest[] on the overriding fear that the executive will abuse its power."<sup>214</sup> This anti-administrative rhetoric interestingly reveals two related yet distinct concerns about executive power. One is that it is unaccountable, best captured by Chief Justice Roberts's plaintive complaint against administrative government as undemocratic in *Free Enterprise*:

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.<sup>215</sup>

The other concern is that executive power is aggrandized, evident in comments singling out administrative government's "vast and varied"<sup>216</sup>

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(Thomas, J., concurring in the judgment); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

<sup>211</sup> 569 U.S. at 313–15 (Roberts, C.J., dissenting).

<sup>212</sup> *Id.* at 312.

<sup>213</sup> See *supra* pp. 21–22.

<sup>214</sup> Sunstein & Vermeule, *supra* note 8, at 44.

<sup>215</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Dissenting, Justice Breyer attacked the majority for adopting an unduly formalistic analysis, arguing that the SEC had multiple mechanisms for overseeing the PCAOB other than removal and that the presence or lack of for-cause removal protection for PCAOB members did not affect presidential control in practice. *Id.* at 519–30 (Breyer, J., dissenting).

<sup>216</sup> *Id.* at 499 (majority opinion).

scope and “arrogation of power.”<sup>217</sup> Core to this concern with “aggrandizement of the power of administrative agencies” is the claim that Congress has “effective[ly] delegat[ed] . . . huge swaths of lawmaking authority” to agencies,<sup>218</sup> so that “agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power.”<sup>219</sup>

The distinction between these two concerns about executive power — that it is politically unaccountable and that it is aggrandized — matters because their respective remedies may stand in some tension. More specifically, those fearing unaccountable power often advocate greater presidential control over government administration.<sup>220</sup> But from an aggrandized power perspective, such a response may simply worsen the problem, adding the President’s popular authority and political leadership to the mix of executive, legislative, and adjudicatory powers agencies wield on their own.<sup>221</sup> These judicial concerns about executive power also appear particularly targeted at domestic and administrative contexts. When it comes to foreign relations, the Roberts Court’s record is mixed, sustaining some strong claims of executive power while rejecting others.<sup>222</sup> But similar rhetorical concerns about executive power spinning out of control or being exercised at odds with the constitutional structure are largely — if not completely<sup>223</sup> — lacking. Anti-administrative Justices also appear more sanguine about executive power in the national security arena.<sup>224</sup> Moreover, on issues of

<sup>217</sup> *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part); see also *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting); *Gutierrez-Zizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>218</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment).

<sup>219</sup> *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting).

<sup>220</sup> See *Free Enterprise*, 561 U.S. at 484 (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.” (quoting U.S. CONST. art. II, § 3)); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016) (“To carry out the executive power and be accountable for the exercise of that power, the President must be able to control subordinate officers in executive agencies.”). See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

<sup>221</sup> See *infra* section III.A, pp. 72–77; see also Sunstein & Vermeule, *supra* note 8, at 47.

<sup>222</sup> Compare *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the President has exclusive power to recognize foreign nations and governments), *with* *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that restrictions on judicial review of executive determinations of enemy-combatant status violated habeas corpus). See also *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that an international treaty agreed to by the President is not domestic law unless it is self-executing or Congress passes implementing legislation).

<sup>223</sup> See *Zivotofsky*, 135 S. Ct. at 2116 (Scalia, J., dissenting) (arguing that the majority’s decision to recognize an exclusive presidential power was an unconstitutional return to the royal prerogative in foreign affairs).

<sup>224</sup> See, e.g., *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089–90 (2017) (Thomas, J., concurring in part and dissenting in part) (arguing for complete lifting of stay on travel and refugee ban issued by President Trump on national security grounds); *Boumediene*, 553 U.S. at 802–

specifically presidential power, anti-administrative Justices are often all over the map, sometimes upholding strong claims of presidential power and sometimes rejecting them.<sup>225</sup> Congress's response to presidential assertions of power, on the other hand, is largely driven by partisanship rather than institutional concerns, with congressional leaders supporting Presidents of their party even at the cost of congressional prerogatives.<sup>226</sup>

Hence, although overlapping at times with more established constitutional critiques of the administrative state such as the unitary executive theory, contemporary anti-administrativism stands as a distinct phenomenon. Further evidence of this comes from the fact that the judicial anti-administrativists' preferred remedy frequently is not greater presidential control. True, the Court in *Free Enterprise* opted for the remedial route of invalidating limits on the President's removal authority. But even *Free Enterprise* sanctioned limits on presidential control by upholding the PCAOB's constitutionality once its structure was reduced to a single level of for-cause removal protection.<sup>227</sup>

2. *The Judicial Turn.* — Instead, the most common response to these fears of unaccountable and aggrandized executive power is an assertion of a greater role for the Article III courts. This judicial turn is particularly evident in the efforts to replace interpretive deference with independent judicial judgment, as well as the growing challenges to administrative adjudication.

Pulling back on deference is often justified as mandated by the APA's instruction that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions."<sup>228</sup> Yet a number of administrative law doctrines represent substantial judicial elaboration in tension with the APA's text.<sup>229</sup> The Court overturned one

13 (Roberts, C.J., dissenting) (emphasizing administrative procedures available to challenge executive detention as well as limited judicial review in concluding detainees' habeas corpus rights were not violated).

<sup>225</sup> Compare *Boumediene*, 553 U.S. at 801 (Roberts, C.J., dissenting), and *id.* at 826 (Scalia, J., dissenting), with *Zivotofsky*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting), and *id.* at 2116 (Scalia, J., dissenting).

<sup>226</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323–25 (2006).

<sup>227</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–10 (2010). *PHH Corp.* similarly accepts such protection for independent regulatory commissions, but frames it more as mandated by governing precedent than a broader principle. 839 F.3d 1, 5–6, 8–9 (D.C. Cir. 2016).

<sup>228</sup> 5 U.S.C. § 706 (2012). In *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), Justice Scalia advanced an additional APA argument, contending that judicial deference to agency regulatory interpretations is at odds with § 553(b)(A), which excluded interpretive rules from notice-and-comment rulemaking procedures because they lacked the force of law. *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment).

<sup>229</sup> Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1300, 1305 (2012) [hereinafter Metzger, *Embracing Administrative Common Law*];

such elaboration recently in *Perez v. Mortgage Bankers Ass'n*,<sup>230</sup> rejecting the D.C. Circuit's one-bite rule allowing agencies only one chance to issue a definitive interpretation of a regulation without having to go through notice-and-comment rulemaking, a restriction that the Court held was "contrary to the clear text of the APA's rulemaking provisions."<sup>231</sup> For the most part, however, there are few judicial calls to pull back on these doctrines as nontextually supported incursions into agencies' rightful discretion.<sup>232</sup> Perhaps the biggest weakness with the APA argument is that taking it seriously would entail dispensing with *Chevron* altogether, but as of now only Justices Thomas and Gorsuch are willing to go so far.<sup>233</sup>

The underlying impetus thus seems less about respecting the APA and more about reasserting judicial power over the executive branch. Further evidence of this comes from the repeated invocations of *Marbury*'s famous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"<sup>234</sup> in justifying denial of deference. To be clear, the suggestion that the courts must independently police agency authority at some level is hardly novel; that proposition is embodied in *Chevron*'s step one, in which courts exercise independent judgment in determining whether Congress has spoken plainly to the question at hand.<sup>235</sup> These new invocations go further, however, and use *Marbury* to argue against granting deference even

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see also *Am. Radio Relay League v. FCC*, 524 F.3d 227, 245–48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting the extent to which current doctrine is at odds with the APA's text on notice-and-comment rulemaking). But see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (arguing that true hard look review is rare).

<sup>230</sup> 135 S. Ct. 1199.

<sup>231</sup> *Id.* at 1206.

<sup>232</sup> If anything, the Supreme Court may be strengthening these doctrines, for example by holding that an agency acted arbitrarily by failing to consider cost at the very outset (as opposed to later in a rulemaking) when the governing statute simply instructed the agency to consider "appropriate" factors in deciding whether to regulate. See *Michigan v. EPA*, 135 S. Ct. 2699, 2706–12 (2015). But see *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782–84 (2016) (emphasizing the limited scope of judicial review of agency reasoning in overturning lower court determination that agency had acted arbitrarily).

<sup>233</sup> See *supra* notes 136–37 and accompanying text; see also *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (noting that the Court had developed deference doctrines at odds with "the original design of the APA" and urging that *Auer* deference be overturned but signaling reluctance to take such a step with respect to *Chevron* deference). Several scholars also advocate dispensing with *Chevron*. See, e.g., HAMBURGER, *supra* note 176, at 315–17; Ginsburg & Menashi, *supra* note 179, at 497–500.

<sup>234</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>235</sup> Peter L. Strauss, *Overseers or "The Deciders"* — *The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 817 (2008). See generally Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).



when statutory ambiguity exists.<sup>236</sup> A similar concern that agencies are trenching on the Article III courts' purview links the deference pullback to the attacks on administrative adjudication.<sup>237</sup> An emphasis on reasserting judicial power also comes from the political sphere, with prohibitions on judicial deference to any agency statutory or regulatory interpretations, as well as provisions for expanded judicial review of agency rulemaking in the proposed RAA and Separation of Powers Restoration Act.<sup>238</sup>

The judicial power arguments against deference come in two varieties, one far more radical than the other. The radical attack maintains that deference is constitutionally prohibited in a twofold sense: first, because deference allows agencies to unconstitutionally exercise judicial power by promulgating binding interpretations of statutes, and second, because independently interpreting statutes is necessary for courts to perform their *Marbury* function and serve as a check on executive power.<sup>239</sup> Both claims rely on a classical understanding of law as having a fixed meaning and interpretation as distinct from policymaking, so that determining "the best policy choice" is different from determining "what the [statute or] regulation means."<sup>240</sup> This argument challenges *Chevron* and *Auer* head-on, particularly *Chevron's* express elision of interpretation and policymaking in many contexts and corresponding acceptance that a statute's or regulation's interpretation can change.<sup>241</sup> But its radical import is even greater: This argument would also preclude Congress from expressly delegating binding interpretative authority to agencies,<sup>242</sup> and its insistence on a firm divide between interpretation and policymaking conflicts with broadly accepted legal realist insights about the frequency of legal indeterminacy, and thus of policymaking, in judicial decisionmaking.<sup>243</sup>

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<sup>236</sup> See, e.g., *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015); *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>237</sup> See *supra* notes 106–08, 180 and accompanying text.

<sup>238</sup> See *supra* notes 48–53 and accompanying text.

<sup>239</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment); *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); see also *Gutierrez-Brizuela*, 834 F.3d at 1149–52 (Gorsuch, J., concurring).

<sup>240</sup> *Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment); Pojanowski, *supra* note 67, at 1089–90.

<sup>241</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005).

<sup>242</sup> Sunstein & Vermeule, *supra* note 8, at 79.

<sup>243</sup> Cass R. Sunstein, Essay, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2591–94, 2598 (2006); see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395–400 (1950).

Further, the argument that Article III compels independent judicial judgment for all questions of statutory interpretation runs into substantial arguments to the contrary. Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack. In such contexts, preserving the federal courts' ability to perform their constitutional function and reach accurate, coherent, and consistent determinations may mandate deference to agency determinations.<sup>244</sup> Nor does the historical record support an independent judgment requirement. Until the early decades of the twentieth century, direct review of executive decisionmaking was rare, and the direct challenges often took the form of mandamus actions that limited the scope of judicial review. Moreover, a number of decisions invoked the propriety of judicial deference to executive statutory interpretations.<sup>245</sup> Legal academics dispute the extent of this deference, but there is substantial support for the view that independent judicial judgment was not thought required for a vast array of executive action, often including questions of statutory interpretation.<sup>246</sup> Longstanding jurisprudence also holds that Article III courts need not be involved at all in adjudications of matters of public right, without regard to whether statutory interpretation was involved.<sup>247</sup> Although the Court's understanding of what counts as public right has varied over time, historically the category included some coercive governmental action, such as forced payment of customs duties, as well as grants of privileges and licenses, such as public land grants.<sup>248</sup> Today, as *Stern* indicated, the Court considers a right to be public when it is "integrally related to particular Federal

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<sup>244</sup> See Peter L. Strauss, Essay, "Deference" Is Too Confusing — Let's Call Them "Chevron Space" And "Skidmore Weight," 112 COLUM. L. REV. 1143, 1144–48 (2012); see also *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130 (1944).

<sup>245</sup> JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 65–78 (2012); see also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912–13, 912 n.5 (2017) (describing sources asserting historical support for such deference).

<sup>246</sup> Compare *United States v. Mead Corp.*, 533 U.S. 218, 260 (2001) (Scalia, J., dissenting) (identifying "a tradition of great deference to the opinions of the agency head"), and Bamzai, *supra* note 245, at 916–19 (identifying a tradition of deference to longstanding and contemporaneous interpretations by executive actors and others), with Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 951–53 (2011) (explaining that when it occurred, nineteenth-century judicial review was largely *de novo*).

<sup>247</sup> See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

<sup>248</sup> Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952, 954 (1988) (detailing coercive actions classified as public right); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–90 (2007) (defining public right as including rights and privileges in individual hands).

Government action.”<sup>249</sup> Either the historical or the contemporary definition could bring much contemporary regulation within the public right category, and thus into the category of actions for which no Article III involvement traditionally was thought constitutionally necessary — let alone *de novo* judicial review.<sup>250</sup>

The radical argument against deference and in favor of independent judicial judgment thus is implausible. That leaves the more restrained approach, which invokes judicial independent judgment instead of *Chevron* deference in only certain situations, such as jurisdictional questions or big-ticket economic and political issues. But little principled basis exists for singling out these situations; the driver instead appears to be judicial intuitions about which statutory questions Congress would want a court to decide.<sup>251</sup> As Justice Scalia wrote for the Court in *City of Arlington*, rejecting a jurisdictional exception to *Chevron*:

The [jurisdictional] label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction. . . . The federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as “jurisdictional,” is not engaged in reasoned decisionmaking.<sup>252</sup>

Moreover, insofar as the underlying logic of this approach is that courts are a necessary check on an ever-growing and out-of-control executive branch, the number of situations when Justices will conclude Congress would want independent judicial judgment seems likely only to grow. This approach thus can quickly become less restrained and not much different from wholesale revocation of *Chevron*, except in its lack of transparency about its aims.

3. *Constitutionalism and Originalism.* — A third theme, evident from the preceding discussion, is anti-administrativism’s heavy consti-

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<sup>249</sup> 564 U.S. 462, 490–91 (2011).

<sup>250</sup> See Fallon, *supra* note 248, at 951–63 (analyzing the tensions that traditional public rights ideas pose to viewing Article III appellate review of administrative determinations as constitutionally necessary). Although the Court has deviated from its traditional exclusion of matters of public right from *any* need for judicial review, it has emphasized that “Article III does not confer . . . an absolute right to the plenary consideration of every nature of claim by an Article III court” and upheld deferential review such as a “weight of the evidence” standard as sufficient to preserve the “essential attributes of judicial power” in the Article III courts. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848, 852–53 (1986).

<sup>251</sup> See Michael Herz, Essay, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1872–79 (2015) (arguing that *Chevron* is fundamentally a doctrine of judicial self-regulation, resting on the courts’ views of when a judicial check on the executive (or judicial turf-protection) is warranted).

<sup>252</sup> 569 U.S. 290, 300–01 (2013).

tutional flavor, particularly in its judicial and academic varieties. Often — though not always<sup>253</sup> — this constitutional dimension is marked by originalism. According to anti-administrative accounts, the core of the Framers’ structural design was limiting government so as to protect individual liberty.<sup>254</sup> But on their view the administrative state does the opposite: where the Framers sought to make it hard for the national government to bind individuals, administrative government makes it easy;<sup>255</sup> where the Framers sought to limit the fields of national action, administrative government expands them; and where the Framers sought to separate out legislative, judicial, and executive power into separate hands and ensure checks among the branches, administrative government combines them into one and dramatically aggrandizes the executive branch.<sup>256</sup> The net result is that the “vast and varied federal bureaucracy’ . . . now hold[s] [authority] over our economic, social, and political activities” to a degree “[t]he Framers could hardly have envisioned.”<sup>257</sup>

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<sup>253</sup> Hamburger’s account, for example, trains most of its attention on seventeenth-century Britain rather than the Framing. HAMBURGER, *supra* note 176; JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 6 (2017).

<sup>254</sup> See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring) (“At the center of the Framers’ dedication to the separation of powers was individual liberty.” (citing THE FEDERALIST NO. 47, at 299 (James Madison) (Clinton Rossiter ed., 2003))); *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) (“The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty.”); *Stern*, 564 U.S. at 483 (“As Hamilton put it, quoting Montesquieu, ‘there is no liberty if the power of judging be not separated from the legislative and executive powers.’” (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003))); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people’s liberties, including all those later enumerated in the Bill of Rights.”).

<sup>255</sup> See, e.g., *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring) (arguing that “bicameralism and presentment make lawmaking difficult *by design*” and that the Constitution’s “deliberative process” is “not something to be lamented and evaded” (alteration omitted) (quoting John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007))); *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (criticizing *Brand X* for allowing regulatory overriding of judicial decisions “without the inconvenience of having to engage the legislative processes the Constitution prescribes,” leading to “[a] form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people”).

<sup>256</sup> See, e.g., *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1254–55 (Thomas, J., concurring) (“We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure.”); *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) (“When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” (alteration in original) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 151–52 (Oskar Piest ed., Thomas Nugent trans., 1949) (1748))).

<sup>257</sup> *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

Separation of powers concerns have long animated administrative law and judicial review of executive action, albeit usually remaining tacit.<sup>258</sup> What is new is thus not their presence but the extent to which constitutional concerns are now openly invoked in administrative law opinions. Yet this express invocation is rarely accompanied by sustained constitutional analysis — perhaps because, as noted above, few Justices seem willing to embrace the rollback in national administrative government that the posited antimony of separation of powers and contemporary national administrative government would seem to entail.<sup>259</sup> The problem for anti-administrativists, however, is that background separation of powers concerns can be addressed in a variety of ways, including approaches that embrace the administrative state rather than cabin it. Concerns about amalgamated powers, for example, could be met by separation of functions requirements within agencies and other internal administrative checks.<sup>260</sup> Posited at a general level, separation of powers principles say little about the constitutionality of the administrative state.

A similar weakness undercuts anti-administrativists' invocations of originalism. As others have noted, there is an unfortunate selectivity to anti-administrativist originalism.<sup>261</sup> Part of the problem with seeking contemporary constitutional conclusions from the original debates on constitutional structure is that the Framers pursued multiple goals.<sup>262</sup> Limiting government — limiting the national government's scope, limiting the ease by which it could enact legislation, and to some extent

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<sup>258</sup> See generally Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010).

<sup>259</sup> See *supra* pp. 21–22, 36.

<sup>260</sup> See, e.g., Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) [hereinafter Metzger, *The Constitutional Duty to Supervise*] (arguing for strengthening internal administrative supervision to meet constitutional structural demands); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622–25 (1984) (emphasizing separation of functions requirements as satisfying separation of powers concerns); see also JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* 62–70 (2016) (identifying that separation of powers imposes an articulated governance requirement that can be satisfied by internal executive branch separation of powers functions). For a discussion of the multitude of internal checks within agencies and the constitutional functions that they play, see *infra* pp. 80–85.

<sup>261</sup> Sunstein & Vermeule, *supra* note 8, at 85–87.

<sup>262</sup> For an eloquent statement of this point and careful exegesis of variations in views of the Framers on separation of powers, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 6 (1996). For a description of the normative plurality underlying the separation of powers and an identification of liberty, effective administration, democratic accountability, and the rule of law as central commitments, see also Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 382–88 (2016).

limiting state governments — was a concern of the Framers.<sup>263</sup> But so were nation-state building and effective government. Indeed, further empowering the national government was the central impetus behind the constitutional convention.<sup>264</sup> While the Federalists were forced to compromise on several features of their nationalist agenda, they succeeded in obtaining a number of powers viewed as essential to the project of creating a viable national government.<sup>265</sup> The decision to create an executive branch headed by a single President — despite the fears of a return to monarchy that it aroused — embodied the Framers’ commitment to ensuring the “energy” and capacity for efficient, coordinated, and effective action that the Articles of Confederation system had lacked.<sup>266</sup> Moreover, some scholars resist the suggested antinomy between these goals of limiting and empowering national government — for instance, arguing that supporters of the Constitution believed that creating “an energetic government” with the “strength to deal with foreign powers and quash interstate rivalries was the surest path to personal liberty.”<sup>267</sup>

Of course, the general proposition that the Framers sought to empower as well as constrain says little about whether particular administrative arrangements are constitutional.<sup>268</sup> But, like anti-administrativism’s invocation of separation of powers, most political and judicial anti-administrativist originalism stays at a general and abstract level. Rather than identifying how a specific administrative arrangement is at odds with original understandings, the claim is that the whole thrust and purpose of modern administrative government deviates from the

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<sup>263</sup> See BARNETT, *supra* note 185, at 52–61; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 5 (2003). However, historical accounts documenting myriad forms of regulation in the name of collective interests, with enforcement by executive officials, suggest that this concern with limiting government in the name of individual liberty is easily exaggerated. See WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 2–3, 10–11, 32–35 (1996).

<sup>264</sup> See EDLING, *supra* note 263, at 4, 7; Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 47–49 (2016).

<sup>265</sup> U.S. CONST. art. I, § 8, cls. 1–5; EDLING, *supra* note 263, at 7–8 (discussing the nation-state building import of Congress’s tax, army, and commerce powers); see also ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 171–76, 185–87 (1993).

<sup>266</sup> THE FEDERALIST NOS. 70, 72, at 421–29, 434–39 (Alexander Hamilton) (Clinton Rossiter ed., 2003); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 34 (Tulane Studies in Political Sci., Vol. IX, 1965); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 75 (2014).

<sup>267</sup> BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 54, 56 (2009); see also RAKOVE, *supra* note 262, at 244–56.

<sup>268</sup> Cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1826 (1996) (“[T]he Founding commitment to energy cannot be discussed in a relative vacuum . . .”).

Framers' separation of powers design.<sup>269</sup> Justice Thomas's detailed originalist assessments of the unconstitutionality of administrative arrangements are an exception, but they are universally solo undertakings.<sup>270</sup> These assessments are also difficult to square with the nation's practice since the Founding. As recent scholarship by Professor Jerry Mashaw and others has established, the national administrative state has a long lineage, with some administrative structures in place even at the Constitution's adoption and national administrative officials playing important governance roles from the Washington Administration onward.<sup>271</sup> But perhaps the strongest count against Justice Thomas's originalist opinions is that they would entail a profound disruption in the nature of contemporary government, as he acknowledges.<sup>272</sup> Other Justices' unwillingness to sign onto his full-bore originalist account may reflect the belief that adopting constitutional understandings that would overturn governance relationships on which the nation has by now long relied cannot be justified.<sup>273</sup>

#### D. *Does Contemporary Anti-Administrativism Matter?*

A movement against national administrative government is thus afoot in the political arena, the courts, and legal academe. Its

<sup>269</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). The opinions in *Noel Canning* and *Stern* engage more extensively with original understandings, but both have limited direct import for administrative government. Some anti-administrative scholars engage originalism in more detail. See, e.g., BARNETT, *supra* note 185, at 203–21; EPSTEIN, *supra* note 185, at 267–84.

<sup>270</sup> See, e.g., *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1245–46 (2015) (Thomas, J., concurring in the judgment) (arguing that any exercise of policymaking authority by the Executive is at odds with original understandings); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215–17 (2015) (Thomas, J., concurring in the judgment) (arguing that *Seminole Rock* deference runs afoul of original checks and balances principles); see also *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948–49 (2017) (Thomas, J., concurring) (explaining the original understanding of the Appointments Clause).

<sup>271</sup> See BALOGH, *supra* note 267, at 2–5, 10–11, 19, 97–105, 117–19, 138–40, 154; RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 1–24 (1995); MASHAW, *supra* note 245, at 5, 34–38, 46, 49, 98–104, 119–43. *But see* POSTELL, *supra* note 253, at 59–102, 127–29 (accepting state and local regulation but disputing suggestions of a significant national administrative state in the early Republic and the nineteenth century). See generally NOVAK, *supra* note 263, at 51–233 (detailing state regulatory efforts). Most of these early administrative institutions were primarily developmental and redistributive rather than regulatory, but not exclusively so. See SAMUEL DECANIO, *DEMOCRACY AND THE ORIGINS OF THE AMERICAN REGULATORY STATE* 21–22 (2015); MASHAW, *supra* note 245, at 193–200.

<sup>272</sup> See *SW General*, 137 S. Ct. at 948–49 (Thomas, J., concurring); *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1252 (Thomas, J., concurring in the judgment).

<sup>273</sup> Cf. *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) (Roberts, C.J., concurring) (“Justice Thomas’s analysis of the present issue is compelling, but . . . [a] sufficient case has not been made for revisiting [two controlling] precedents.”); *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (“[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.”).

significance, however, is unclear. In particular, is the national administrative state really under siege, or are we simply witnessing an anti-administrative phase likely to have little lasting effect?

Some anti-administrative moves could prove quite significant. The RAA, for example, would be a substantial impediment to major and high-impact rulemakings if enacted, the REINS Act even more so.<sup>274</sup> Scholarship documenting the deregulatory effect of OIRA review even absent a 2–1 repeal requirement suggests that the regulatory initiatives of the Trump Administration could be momentous as well,<sup>275</sup> and regulatory repeals have already undone rules years in the making. The Court’s First Amendment decisions, particularly *Citizens United*, have had a profound effect on certain regulatory regimes.<sup>276</sup> If a majority of the Court were to reject the constitutionality of broad delegations or the combination of functions in a single agency, much of the national administrative state would be in immediate jeopardy. Similarly, invalidation of administrative adjudication as violating Article III or as unconstitutionally biased by virtue of agencies’ additional rulemaking and enforcement roles would have a dramatic effect, calling into question basic and longstanding features of our national administrative landscape.<sup>277</sup>

But as noted above, good reasons exist to conclude that few of these more radical political moves will come to pass. So far the judicial bark has been fiercer than its bite, and when the Roberts Court has invalidated an administrative arrangement on constitutional grounds, it has often done so narrowly (as in *Free Enterprise* and *Noel Canning*), or in ways that could minimize the impact on administrative governance (as in *Stern* and *NFIB*).<sup>278</sup> For all their success of late, First Amendment challenges are unlikely to render broad swaths of the national administrative state unconstitutional. Support is growing on the Court for some

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<sup>274</sup> See *supra* notes 37–46 and accompanying text.

<sup>275</sup> See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–82 (2006) (arguing that OIRA has an inherently deregulatory bias because (1) it focuses on cost-benefit analysis, (2) it is not rigorous regarding decisions to deregulate, (3) it does not regulate agency inaction, and (4) it is structured procedurally to support deregulation).

<sup>276</sup> See Purdy, *supra* note 149, at 195 (“Constitutional neoliberalism is broad in that it touches many areas of legal regulation, from state controls on pharmaceutical marketing to the federal individual-insurance mandate to corporate campaign contributions.”); see also Shanor, *supra* note 149, at 134 (“[T]he First Amendment has emerged as a powerful deregulatory engine.”).

<sup>277</sup> See *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (remarking that finding the FTC biased in its adjudication of antitrust claims “would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act”); see also 5 U.S.C. §§ 554, 556–57 (2012) (providing for de novo review of ALJ determinations by the head of the relevant agency).

<sup>278</sup> On *NFIB*’s limited import, see, for example, Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 898–902 (2013), which argues that the use of the “anti-leveraging principle” did a reasonably good job accommodating constitutional values without threatening the constitutionality of too many Spending Clause laws.



pullback on judicial deference to agency interpretations, yet several scholars argue that such a pullback would have little impact in practice. The reasons given — first, that courts deferred before *Chevron* and *Auer* and would continue to do so regardless, and second, that *Chevron* and *Auer* do little work because they are riddled with exceptions — are somewhat contradictory, but lead to the same conclusion.<sup>279</sup>

All of this might suggest that the current attack on the national administrative state is of little lasting significance.<sup>280</sup> This view strikes me as too sanguine a stance for supporters of national administrative governance to take. Deep cutbacks in resources and personnel can undercut administrative capacity in ways that are not immediately reversible by changing legislative and executive branch political control.<sup>281</sup> Some seemingly moderate administrative limitations could prove quite disruptive, moreover. For example, Justice Alito's view that public arbitrators are principal officers in *American Railroads*<sup>282</sup> would invalidate numerous regulatory arrangements in which officials not appointed by the President exercise some degree of unreviewable discretion, and dramatically expand the pool of positions for which presidential nomination and Senate confirmation are required.<sup>283</sup> Similarly, if ALJs are deemed inferior officers, there would be an immediate impact on government operations. Moreover, that conclusion might call into question a massive number of past administrative adjudications in agencies like the SEC where ALJs are not selected by the agency head — particularly given the Court's reluctance to uphold decisions in similar circumstances on a de facto officer doctrine basis.<sup>284</sup> Such a holding would

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<sup>279</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) (“We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change — except perhaps the most important things.”); VERMEULE, *supra* note 147, at 31, 74–76; Beermann, *supra* note 194, at 809–35, 845–50 (discussing the problems that have developed in employing *Chevron* and the possibility of retaining deference toward agencies even if *Chevron* were overruled).

<sup>280</sup> Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 (2017) (“[T]he administrative state has never been more secure.”).

<sup>281</sup> See RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC* 5, 65–70 (2010) (describing the impact of funding shortfalls on agencies and the political difficulty involved in expanding funding).

<sup>282</sup> 135 S. Ct. 1225, 1235–39 (2015) (Alito, J., concurring). Justice Alito's view was adopted by the D.C. Circuit. *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 37–38 (D.C. Cir. 2016).

<sup>283</sup> Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94 (2003) (describing a number of modern private delegations potentially compromised by the revival of private nondelegation doctrine); see also Mascott, *supra* note 99, at 62–69 (describing the vast array of federal agents who could be considered “officers” subject to constitutional appointment procedures); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013) (describing the past, present, and future of private delegation).

<sup>284</sup> *Ryder v. United States*, 515 U.S. 177, 182–84 (1995); cf. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (failing to consider the possibility of sustaining agency decisions decided when agency erroneously thought it was authorized to act, even though the effect was to call into question

also create serious constitutional problems with how ALJs are appointed and removed — perhaps curable by having agency heads pick ALJs and ending the removal protection for members of the Merit Systems Protection Board, but at the cost of making administrative adjudication less politically insulated and undermining key features of the APA regime.<sup>285</sup>

Assessing the impact of a pullback in subconstitutional deference is difficult, given selection bias and the dynamic effects such a pullback might have. *Chevron* likely deters regulated parties from bringing certain challenges and also encourages agencies to push their interpretative powers in creative ways.<sup>286</sup> A retraction in deference thus might have a substantially greater impact than suggested by simply considering the number of cases today in which *Chevron* or *Auer* deference is actually determinative. Further, at the lower court level, where the bulk of challenges to agency actions are resolved, scholars have suggested that *Chevron* deference is in fact more determinative than many believe.<sup>287</sup> As important, to the extent such a pullback in deference rests on an account of interpretation as distinguishable from policymaking, the pullback could extend to situations in which interpretation occurs through agency application of a statutory standard to different factual contexts — a vast range of agency action not often thought of as falling under the *Chevron* aegis.<sup>288</sup>

More broadly, contemporary anti-administrativism may serve to undercut the legitimacy of national administrative governance. Professor Richard Fallon helpfully distinguishes among three forms of legitimacy: legal, meaning conforming with legal norms; sociological, meaning publicly accepted; and moral, meaning normatively justified.<sup>289</sup> The frequent suggestion that the national administrative state is at odds with the constitutional framework most directly challenges that state's legal legitimacy. It is such legal doubts that led Professor James Freedman to famously describe national administrative governance as subject to a

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“more than 500 cases [the agency had] addressed during those 26 months,” *id.* at 689 (Kennedy, J., dissenting)).

<sup>285</sup> Barnett, *supra* note 98, at 827–61 (discussing a variety of possible remedies to “the ALJ quandary” and positing that appointment by the D.C. Circuit would resolve constitutional problems without elevating due process concerns related to presidential control).

<sup>286</sup> Sunstein, *supra* note 243, at 2598–600.

<sup>287</sup> See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 67), <https://ssrn.com/abstract=2808848> [<https://perma.cc/J8U9-LCEC>].

<sup>288</sup> See, e.g., Pojanowski, *supra* note 67, at 1085–90 (discussing the effect eliminating *Chevron* would have on the disaggregation of policymaking and statutory interpretation).

<sup>289</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–96 (2005); see also Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) (discussing different psychological theories of legitimacy).

“recurrent sense of crisis” over its legitimacy.<sup>290</sup> But the constant repetition of this motif, combined with the Court’s rhetorical invocations of liberty-threatening bureaucrats, undermines the administrative state’s sociological and moral legitimacy as well. Of course, to someone who believes that the national administrative state actually is unconstitutional and should be cast aside, such a lack of legitimacy is entirely appropriate. But few Justices, politicians, or academics appear willing to go that far, despite their frequent rhetorical jabs at bureaucracy and invocations of current administrative arrangements as at odds with the Framers’ plan.

Adrian Vermeule disputes this legitimacy concern, terming constitutional anxiety about the administrative state “a largely elite discourse . . . . It is a conceptual mistake to think that complaints about the administrative state, even on constitutional grounds, are necessarily sociological evidence of the illegitimacy of the regime.”<sup>291</sup> The 1930s support his point to some extent; as Part II describes, the constitutional battle that elite lawyers waged failed to undermine massive popular support for the New Deal administrative state. And current political attacks on administrative governance come in conjunction with broad popular support for many government programs. As Vermeule notes, “[a] nation that twice elected Barack Obama by clear margins is a nation comfortable with technocratic governance.”<sup>292</sup>

Yet rhetoric can take on a life of its own, as recent constitutional challenges to the Affordable Care Act showed, all the more when constitutional discourse is employed to political ends.<sup>293</sup> Moreover, anxiety over the administrative state’s constitutionality can operate to limit its potential for further development and innovation.<sup>294</sup> That may be a good part of the anti-administrativists’ goal, particularly in the judicial sphere. Decisions like *Free Enterprise* have a “this far but no further” feel, which connects to the Court’s resistance to innovative administrative structures and regulatory regimes. Indeed, absent an anti-administrative orientation, this resistance to innovation is hard to explain.

<sup>290</sup> JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 11 (1978).

<sup>291</sup> Vermeule, *supra* note 280, at 2465.

<sup>292</sup> Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> [<https://perma.cc/FVD7-DT77>].

<sup>293</sup> Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012) [hereinafter Balkin, *From Off the Wall to On the Wall*], <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [<https://perma.cc/HUG8-4ABX>]; see also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* (2011).

<sup>294</sup> Jeremy K. Kessler, *The Struggles for Administrative Legitimacy*, 129 HARV. L. REV. 718, 771 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)).

Given Congress's broad power to structure the executive branch and design regulatory schemes, one would expect the presumption to run in favor of constitutionality, at least when the innovation is embodied in legislation.<sup>295</sup> Even further, such anxiety may have a corrosive effect over time, leading to greater scrutiny of agency decisionmaking and erosion of established administrative mechanisms.<sup>296</sup> In short, rhetorical anti-administrativism can have real practical bite, even if one that emerges gradually and indirectly.

The current attack on the administrative state has two further effects that are explored in the Parts that follow. The first relates to the close intertwining of contemporary political and constitutional anti-administrativism. Anti-administrativism's deeply rooted conservative character means that constitutional attacks on administrative governance risk injecting the Court even further into national politics, at a time when the Court is increasingly viewed as a partisan institution. The second centers on anti-administrativism's impact on constitutional law. By framing the debate as one of administrative government's unconstitutionality, anti-administrativism obscures the possibility that the national administrative state may actually serve important constitutional functions, such as controlling executive power. Furthermore, this framing renders incoherent the suggestion that far from being constitutionally questionable, today's national administrative state is constitutionally obligatory. Returning to the 1930s elucidates the first of these effects and sets the stage for reconceiving the administrative state's constitutional role.

## II. 1930s REDUX I: TWENTIETH-CENTURY CONSERVATIVE RESISTANCE TO ADMINISTRATIVE GOVERNMENT

Building out the national state was a constant and contested process from the Founding through the nineteenth century.<sup>297</sup> The period of

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<sup>295</sup> See *NFIB v. Sebelius*, 567 U.S. 519, 537–38 (2012) (describing reach of congressional authority); Metzger, *supra* note 86, at 1639 (“The ability to design innovative governmental structures or regulatory measures is a flexibility the Constitution’s Necessary and Proper Clause gives to Congress.”). For a thorough analysis of the flaws with the Court’s opposition to innovation, see Litman, *supra* note 81.

<sup>296</sup> See Francis Fukuyama, *The Ties that Used to Bind: The Decay of American Political Institutions*, AM. INTEREST (Dec. 8, 2013), <https://www.the-american-interest.com/2013/12/08/the-decay-of-american-political-institutions/> [<https://perma.cc/Z5AH-VY8T>] (“Distrust of executive agencies leads [to] demands for more legal checks on administration, which further reduces the quality and effectiveness of government by reducing bureaucratic autonomy.”).

<sup>297</sup> See, e.g., BALOGH, *supra* note 267, at 12–17, 379–82 (describing patterns of nation-state development over the nineteenth century); MASHAW, *supra* note 245, at 5–17 (arguing that the national administrative state existed and developed throughout the first one hundred years of U.S. history); THEODORE SKY, *TO PROVIDE FOR THE GENERAL WELFARE: A HISTORY OF THE FEDERAL SPENDING POWER 111–247* (2003) (detailing debates over the national government’s power to undertake internal improvements that were waged throughout the first half of the nineteenth century).

greatest relevance to contemporary anti-administrativism, however, is the 1930s. It was in the Progressive Era at the end of the nineteenth century and the early decades of the twentieth that national administrative government truly blossomed. And it was in the 1930s, in business and legal resistance to the New Deal and FDR, that an existential battle over the national administrative state was last fought. In the years since, the national government has expanded and gained significant new powers and responsibilities. Nonetheless, that 1930s battle bears striking parallels to the current attack and represents an important backdrop against which to assess contemporary anti-administrativism.

A. *The Liberty League and the ABA Special Committee*

Anti-administrativists often identify the Progressive Era, from the late nineteenth century through the early decades of the twentieth, as the time when the national government went off the constitutional rails and over to the dark side of administrative government.<sup>298</sup> Transformations in manufacturing, technology, and economic relations in this era sparked expansions in both national and state regulatory authority. The national administrative state continued to grow over the first four decades of the twentieth century.<sup>299</sup> FDR's election and enactment of the broad regulatory statutes of the New Deal thus was not a sudden move to administrative government, but it did represent a significant intensification.<sup>300</sup>

Many businesses were initially quite supportive of national intervention to address the economic crisis of the Depression. Big businesses particularly favored the National Industrial Recovery Act's<sup>301</sup> (NIRA) suspension of antitrust laws and reliance on industry-developed business codes, which they controlled.<sup>302</sup> *Harper's Magazine* went so far as to

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<sup>298</sup> See, e.g., BARNETT, *supra* note 185, at 123–53; MURRAY, *supra* note 184, at 11–29.

<sup>299</sup> William J. Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW'S CENTURY 249, 262–65 (Austin Sarat et al. eds., 2002) (identifying the formative period of growth of the American state occurring between 1877 and 1937).

<sup>300</sup> LICHTMAN, *supra* note 59, at 58–59.

<sup>301</sup> Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1966).

<sup>302</sup> See LICHTMAN, *supra* note 59, at 68–69; see also ROBERT F. BURK, THE CORPORATE STATE AND THE BROKER STATE: THE DU PONTS AND AMERICAN NATIONAL POLITICS, 1925–1940, at 112–21 (1990) (detailing Pierre du Pont's involvement in the NIRA). Business interests sometimes supported earlier progressive regulatory measures as well, such as the maximum hours for bakers law at issue in *Lochner v. New York*, 198 U.S. 45 (1905), which established bakeries supported as a means to push their smaller-scale competitors out of business and ease their relationship with the bakers' union. See BERNSTEIN, *supra* note 185, at 23; see also Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in TOWARDS A NEW PAST 263, 263–82 (Barton J. Bernstein ed., 1968) (arguing that the New Deal represented conservative reform).

dub the NIRA the “child” of big business.<sup>303</sup> But this support soon began to sour, largely in response to growing protections for labor, expanding governmental economic regulation, and higher taxes.<sup>304</sup> The growing business resistance surfaced in litigation and legislative reform efforts. Such litigation was at first spectacularly successful, with *A.L.A. Schechter Poultry Corp. v. United States*,<sup>305</sup> *United States v. Butler*,<sup>306</sup> and *Carter v. Carter Coal Co.*<sup>307</sup> invalidating major legislation from FDR’s first one hundred days as exceeding the constitutional scope of Congress’s authority and representing unconstitutional delegations of legislative power.<sup>308</sup> Two organizations central to business efforts challenging the New Deal were the American Liberty League (the League) and the American Bar Association’s (ABA) Special Committee on Administrative Law.<sup>309</sup>

1. *The Liberty League.* — The Liberty League, termed the “most articulate spokesman of . . . political conservatism”<sup>310</sup> in the 1930s, was the more overtly political of the two organizations. It was also overtly tied to big business, being founded in 1934 by several major industrialists, in particular the brothers Pierre, Irénée, and Lamot du Pont of the E.I. du Pont de Nemours company and their associates.<sup>311</sup> The League contained a number of well-known Republicans and Democrats; what linked the members of the League, in addition to their economic

<sup>303</sup> John T. Flynn, *Whose Child Is the NRA?*, HARPER’S MAG., Sept. 1934, at 385, 394.

<sup>304</sup> See BURK, *supra* note 302, at 122–42; KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* 3–6 (2010).

<sup>305</sup> 295 U.S. 495 (1935) (invalidating section 3 of the NIRA).

<sup>306</sup> 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

<sup>307</sup> 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935).

<sup>308</sup> See also, e.g., *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating a portion of the NIRA).

<sup>309</sup> These were not the only organizations active against the New Deal and FDR’s initiatives. Other groups with business and corporate ties included the American Newspaper Publishers Association, the Chamber of Commerce, the Crusaders, the National Association of Manufacturers, and the Sentinels of the Republic. In addition, there were groups organized to oppose the court-packing plan, like the Committee to Uphold Constitutional Government, as well as popular leaders viewed as quasi-fascist, such as Senator Huey Long of Louisiana and the “radio priest” Father Charles Coughlin. See ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* xi–xii (1982); LICHTMAN, *supra* note 59, at 62–76, 88, 94, 114; Kessler, *supra* note 149, at 1923, 1930–34, 1943–48.

<sup>310</sup> GEORGE WOLFSKILL, *THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE* 1934–1940, at viii (1962); see also LICHTMAN, *supra* note 59, at 70 (“The Liberty League . . . commence[d] the most ambitious marketing of conservative ideas in American history.”).

<sup>311</sup> See BURK, *supra* note 302, at 134–41; Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19, 21–22 (1950). The League was in many ways a successor to the Association Against the Prohibition Amendment (AAPA), an organization largely controlled by the Du Ponts that led the national campaign to adopt a constitutional amendment repealing Prohibition. For an account of the AAPA and the Du Ponts’ involvement, see BURK, *supra* note 302, at 16–121.

interests, was not party but conservatism.<sup>312</sup> Despite insisting that it was nonpartisan, the League was rabidly anti–New Deal and opposed to FDR. League pamphlets with titles like “The President Wants More Power” and “Will It Be Ave Caesar?” not to mention statements by League leaders that “Roosevelt desires to pass laws utterly destructive of liberty,” hardly suggested political neutrality.<sup>313</sup> Thus, not surprisingly, the League was strongly attacked by FDR’s backers, and FDR himself used the League as a punching bag during the 1936 election.<sup>314</sup> After Roosevelt won by a landslide, the League quickly became dormant until it dissolved in 1940.<sup>315</sup>

A striking feature of the League was its insistence on attacking the New Deal on constitutional grounds<sup>316</sup> — a strategic choice, as critiquing the New Deal for burdening elite economic interests would not have been a popular move.<sup>317</sup> The League was much more concerned with some constitutional provisions than others, however. Its focus was on resisting economic regulation and opposing the national administrative state, with frequent invocations of property rights and the right to work, combined with attacks on the national government’s incursion into the proper realm of the states, profligate taxing and spending, and use of broad legislative delegations.<sup>318</sup> Thus, for example, in its platform the

<sup>312</sup> WOLFSKILL, *supra* note 310, at 36; Arthur Krock, *American Liberty League Soon to Begin Activities*, N.Y. TIMES, Nov. 10, 1934, at 14.

<sup>313</sup> James A. Reed, *Shall We Have Constitutional Liberty or Dictatorship?*, Address Before the Lawyers’ Association of Kansas City (Apr. 14, 1936), in AM. LIBERTY LEAGUE, DOCUMENT NO. 120, at 1, 14 (1936); see AM. LIBERTY LEAGUE, LEAFLET NO. 1, THE PRESIDENT WANTS MORE POWER: IS A SCRAPPED CONSTITUTION TOO HIGH A PRICE TO PAY FOR IT? (1936); AM. LIBERTY LEAGUE, LEAFLET NO. 6, WILL IT BE AVE CAESAR? (1936) (reprinted from WASH. HERALD, June 24, 1935); see also WOLFSKILL, *supra* note 310, at 108.

<sup>314</sup> See, e.g., PHILLIPS-FEIN, *supra* note 304, at 20 (noting FDR’s “relentless assault on the American Liberty League”); Kessler, *supra* note 149, at 1930 (quoting FDR as saying that the “tenets” of the American Liberty League “appear[] to be to love thy God but forget thy neighbor . . . only God, in this case, appear[s] to be property” (alterations in original) (internal quotation marks omitted)); Rudolph, *supra* note 311, at 29–30; George S. Silzer, Letter to the Editor, *A Partisan Organization: American Liberty League Viewed as Anti-Roosevelt*, N.Y. TIMES, Aug. 28, 1934, at 20.

<sup>315</sup> Rudolph, *supra* note 311, at 32–33.

<sup>316</sup> See AM. LIBERTY LEAGUE, A STATEMENT OF ITS PRINCIPLES AND PURPOSES (1934). See generally Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287 (2014) (discussing the League’s constitutional focus).

<sup>317</sup> LICHTMAN, *supra* note 59, at 61 (quoting League founder and General Motors executive Donaldson Brown as saying that “[a]ny organization which was known to be directly interested primarily in the defense of established property rights” would lack public support); WOLFSKILL, *supra* note 310, at 111.

<sup>318</sup> WOLFSKILL, *supra* note 310, at 116, 138; AM. LIBERTY LEAGUE, DOCUMENT NO. 26, YESTERDAY, TODAY AND TOMORROW: A REVIEW OF FACTUAL ANALYSES ISSUED BY THE AMERICAN LIBERTY LEAGUE AND SOME DISCUSSION OF THE PRESENT LEGISLATIVE SITUATION (1935) [hereinafter AM. LIBERTY LEAGUE, DOCUMENT NO. 26]; Raoul E. Desvernine, Chairman, Nat’l Lawyers Comm. of the Am. Liberty League, Speech at the Institute of Public Affairs (July 11, 1935), in AM. LIBERTY LEAGUE, DOCUMENT NO. 52, THE PRINCIPLES OF CONSTITUTIONAL DEMOCRACY AND THE NEW DEAL 10–12 (1935).

League committed to “maintain the right of an equal opportunity for all to work, earn, save and acquire property”<sup>319</sup> and to “uphold the American principle that laws be made only by the direct representatives of the people in Congress, and that the laws be interpreted only by the Courts, and to oppose the delegation of either of these functions to executive departments, commissions, or bureau heads.”<sup>320</sup> Profligate congressional delegations to the executive were a common theme of League attacks, with calls for “an immediate cessation of attempts to subvert basic constitutional principles through . . . delegation” and warnings that such delegations represented “an abdication by the Congress of its proper responsibilities and . . . a step toward the European type of dictatorship.”<sup>321</sup>

The League repeatedly warned of unlawful administrative assertions of power and expanding bureaucracy. Its leaders frequently invoked the Framers, declaring that “[o]ur forefathers were suspicious of government . . . [and] erected barriers in the Constitution to prevent government from ever placing the deadening hand of bureaucracy upon the initiative, enterprise, energy and self-reliance of the private citizen.”<sup>322</sup> The League sometimes put the point more floridly, insisting that “[t]he Federal bureaucracy has become a vast organism spreading its tentacles over the business and private life of the citizens of the country.”<sup>323</sup> Similarly, sounding a note eerily relevant today, the League condemned the

<sup>319</sup> AM. LIBERTY LEAGUE, ITS PLATFORM 3 (1935).

<sup>320</sup> *Id.* at 4; *see also* Jouett Shouse, President, Am. Liberty League, Speech at the Young Men’s Hebrew Association of St. Louis, Missouri (Feb. 12, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 16, THE CONSTITUTION STILL STANDS 10 (1935) (decrying “the establishment of a centralized Federal Government such as was never contemplated” and “the dangerous relinquishment of legislative powers to the Executive” present in New Deal legislation); WOLFSKILL, *supra* note 310, at 116.

<sup>321</sup> AM. LIBERTY LEAGUE, DOCUMENT NO. 26, *supra* note 318, at 4, 8; *see, e.g.*, AM. LIBERTY LEAGUE, DOCUMENT NO. 19, THE PENDING BANKING BILL: AN ANALYSIS OF A PROPOSAL TO SUBJECT THE NATION’S MONETARY AND BANKING STRUCTURE TO THE EXIGENCIES OF POLITICS (1935) (arguing that the proposed Banking Act of 1935 represented congressional abdication and further expansion of executive power); R.E. Desvermine, Member, Nat’l Advisory Council, Am. Liberty League, Speech over the Blue Network of the National Broadcasting Company (May 16, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 35, HUMAN RIGHTS AND THE CONSTITUTION 7 (1935) (“[I]nnumerable commissions have been created with the most far-reaching delegated legislative powers and with absolute discretion to interpret, administer and enforce . . .”).

<sup>322</sup> Borden Burr, Member, Nat’l Advisory Council, Am. Liberty League, Speech Before the Kiwanis Club at Columbus, Mississippi (Sept. 19, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 70, THE CONSTITUTION AND THE SUPREME COURT 9 (1935); *see also* Jouett Shouse, President, Am. Liberty League, Speech Before the Philadelphia County League of Women Voters (Feb. 4, 1935), *in* AM. LIBERTY LEAGUE, DOCUMENT NO. 14, DEMOCRACY OR BUREAUCRACY (1935).

<sup>323</sup> AM. LIBERTY LEAGUE, DOCUMENT NO. 133, FEDERAL BUREAUCRACY IN THE FOURTH YEAR OF THE NEW DEAL 4 (1936); *see also* AM. LIBERTY LEAGUE, DOCUMENT NO. 57, EXPANDING BUREAUCRACY 2 (1935) (“The mushroom growth of the Federal bureaucracy



increased use of executive orders, arguing that “[l]aws enacted since March, 1933, delegating broad power to the Executive, have . . . [countenanced] lawmaking by executive order . . . to a degree unprecedented and almost unbelievable.”<sup>324</sup>

The League regularly turned to lawyers to make its constitutional arguments. Soon after its founding, the League assembled a National Lawyers Committee (NLC) composed of many eminent business lawyers of the day.<sup>325</sup> The NLC undertook to assess the constitutionality of several major pieces of New Deal legislation, all of which it deemed to violate constitutional limits on the commerce power, economic due process, and (in some cases) the jury trial right or prohibitions on delegation of legislative power to the executive.<sup>326</sup> Its first report, condemning the National Labor Relations Act (NLRA) as unconstitutional on Commerce Clause and due process grounds,<sup>327</sup> sparked a public outcry, with the NLC lawyers attacked for serving their business clients’ anti-labor interests.<sup>328</sup> The NLC provided ammunition for these claims, describing the report not just as providing a detailed brief for why the statute was unconstitutional but also as justifying noncompliance by regulated companies. In the words of the NLC lawyer who led the NLRA report: “When a lawyer tells a client that a law is unconstitutional, . . . it is then a nullity and he need no longer obey that law.”<sup>329</sup>

Several of the League’s lawyers also argued constitutional challenges in court. NLC lawyers filed briefs in many of the early challenges to New Deal legislation at the Supreme Court, including *Butler*, *Carter Coal*, *NLRB v. Jones & Laughlin Steel Corp.*,<sup>330</sup> *Jones v. SEC*,<sup>331</sup> and *Ashwander v. Tennessee Valley Authority*.<sup>332</sup> Lawyers who were fellow

during the past two years represents . . . a menace to the liberties, rights and welfare of individual citizens and business enterprises.”)

<sup>324</sup> AM. LIBERTY LEAGUE, DOCUMENT NO. 60, LAWMAKING BY EXECUTIVE ORDER 3 (1935); see also *id.* at 21 (“By no stretch of the imagination can many of these orders be regarded merely as ministerial acts in execution of laws enacted by the Congress.”).

<sup>325</sup> See RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 81, 89–92 (1995). Professor Daniel Ernst notes that lawyers were divided on the New Deal and growing administrative state, with corporate lawyers often being more favorably disposed to administrative adjudication subject to limited judicial review (provided such adjudication was subject to procedural constraints) than trial lawyers. ERNST, *supra* note 294, at 5–6.

<sup>326</sup> WOLFSKILL, *supra* note 310, at 72–78.

<sup>327</sup> See NAT’L LAWYERS COMM. OF THE AM. LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935).

<sup>328</sup> See WOLFSKILL, *supra* note 310, at 73 (quoting attacks on the NLC report in *The Nation* and *The New Republic*).

<sup>329</sup> *Id.* at 72 (quoting the chairman of the subcommittee that drafted the report).

<sup>330</sup> 301 U.S. 1 (1937).

<sup>331</sup> 298 U.S. 1 (1936).

<sup>332</sup> 297 U.S. 288 (1936); Memorandum from Eve A. Levin on The NLC, ABA, and Anti-New Deal Litigation to Gillian Metzger 4–10 (June 10, 2017) [hereinafter Levin] (on file with the Harvard Law School Library) (detailing the NLC’s participation in legal challenges to the New Deal).

travelers, if not actual NLC members, played a major role in many more — including most prominently Frederick H. Wood, a litigation partner at Cravath who led the constitutional challenges in the *Schechter Poultry*, *Carter Coal*, and *Morgan v. United States*<sup>333</sup> cases, among others.<sup>334</sup> After its early success, this full-bore constitutional attack on the New Deal famously hit a judicial wall in 1937, with *Jones & Laughlin* sustaining the NLRA as within congressional power and *West Coast Hotel Co. v. Parrish*<sup>335</sup> sustaining minimum wage legislation against a due process challenge.<sup>336</sup> Scholars debate whether this represented a sudden switch to stave off FDR's court-packing threat or a more gradual doctrinal evolution, but all agree that within a few years — and after FDR had appointed seven new Justices — constitutional limits to economic regulation and national administration had largely disappeared.<sup>337</sup>

2. *The Special Committee.* — The ABA Special Committee was formed in 1933 to address perceived deficiencies in administrative law and administrative procedures raised by lawyers representing clients before administrative agencies. Many of these concerns predated FDR's election, but with the advent of the New Deal the Special Committee's ambit became more ambitious and more politically charged.<sup>338</sup>

Although the memberships of the League's NLC and the Special Committee were different, there was extensive overlap between the NLC and the ABA, with NLC members often in leadership positions at the ABA and involved in other ABA committees targeting the New Deal.<sup>339</sup> Indeed, this overlap became a liability for the ABA, subjecting it to the same criticisms of serving the interests of economic privilege.<sup>340</sup> One particularly fitting connection between the NLC and the Special Committee was the claim by Ollie Roscoe McGuire, the many-year

<sup>333</sup> 298 U.S. 468 (1936).

<sup>334</sup> See SHAMIR, *supra* note 325, at 81–92 (detailing an elite network of lawyers that fought the New Deal); Levin, *supra* note 332, at 4–8 (describing the connections among lawyers involved in these challenges). Although Wood is not included on lists of NLC members, Professor Peter Irons reports that Wood was an NLC member and that the League helped subsidize Wood's representation in *Schechter Poultry*. PETER H. IRONS, *THE NEW DEAL LAWYERS* 98 (1982).

<sup>335</sup> 300 U.S. 379 (1937).

<sup>336</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31–32 (1937); *West Coast Hotel Co.*, 300 U.S. at 379–99.

<sup>337</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 229–35 (2009). Compare BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 5–7 (1998), with LEUCHTENBURG, *supra* note 22, at 213–36.

<sup>338</sup> ERNST, *supra* note 294, at 119; JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 20–22* (2014); Dan Ernst, *The Special Committee on Administrative Law*, LEGAL HIST. BLOG (Sept. 27, 2008, 12:38 PM), <http://legalhistory-blog.blogspot.com/2008/09/special-committee-on-administrative-law.html> [https://perma.cc/3M5D-ALMT].

<sup>339</sup> See SHAMIR, *supra* note 325, at 88–92; Levin, *supra* note 332, at 1–4.

<sup>340</sup> See SHAMIR, *supra* note 325, at 30–31, 68–70, 92; Levin, *supra* note 332, at 4.

Chair of the Special Committee, to have written much of prominent NLC member (and former Solicitor General) James Montgomery Beck's tirade against administrative government, *Our Wonderland of Bureaucracy*.<sup>341</sup> Moreover, like the League, the Special Committee claimed neutrality on the New Deal policies but repeatedly expressed concern about the spreading expanse of national power and national administration. Its initial report described the legislation of FDR's first one hundred days as "represent[ing] an advance of federal administrative machinery, on a scale and to an extent never before attempted, into fields not heretofore brought under federal regulation."<sup>342</sup>

Early on, the Committee flagged separation of powers and due process concerns with the delegation of legislative and judicial powers to the executive branch as well as these powers' combination in a single agency's hands, often without provision for judicial review.<sup>343</sup> Yet, unlike the League, identifying constitutional infirmities with expanding administrative government was not the Special Committee's focus. Instead, the Committee devoted itself to recommending legislative reforms that would tame "administrative absolutism" and abuse, advocating for greater and more uniform procedural requirements, independence for administrative adjudication, and broad judicial review.<sup>344</sup> For several years the Committee urged the creation of a single administrative court in which all administrative adjudication would occur, but repeatedly ran into opposition from lawyers who practiced before existing administrative tribunals and did not want consolidation.<sup>345</sup> After failing in that effort, the Special Committee switched gears and began to push

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<sup>341</sup> JAMES M. BECK, *OUR WONDERLAND OF BUREAUCRACY: A STUDY OF THE GROWTH OF BUREAUCRACY IN THE FEDERAL GOVERNMENT, AND ITS DESTRUCTIVE EFFECT UPON THE CONSTITUTION* (1932); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557, 1573-74 (1996).

<sup>342</sup> *Report of the Special Committee on Administrative Law*, 56 *ANN. REP. A.B.A.* 407, 408 (1933); see also *id.* at 415; Shepherd, *supra* note 341, at 1569-75 (discussing the 1933 Committee's objections and solutions to perceived problems with agency authority).

<sup>343</sup> *Report of the Special Committee on Administrative Law*, *supra* note 342, at 409-11, 414, 424-25; see also *Proceedings of the Fifty-Eighth Annual Meeting of the American Bar Association*, 56 *ANN. REP. A.B.A.* 57, 141 (1935) ("[T]he citizen's right to engage in an honorable calling is subject to revocation for violation of some regulation which a commission has made, and the same commission prosecutes for violation of the regulation and sits as judge in its own case . . . ." (statement of Louis G. Caldwell, Chair of the Special Committee)).

<sup>344</sup> *Report of the Special Committee on Administrative Law*, 63 *ANN. REP. A.B.A.* 331, 342-46 (1938).

<sup>345</sup> *Report of the Special Committee on Administrative Law*, 57 *ANN. REP. A.B.A.* 539, 539-40 (1934); Louis G. Caldwell, *A Federal Administrative Court*, 84 *U. PA. L. REV.* 966 (1936) (describing the proposal). The question of whether to push for a single administrative court proved internally contentious in the ABA, as lawyers with established practices before existing tribunals wanted those tribunals preserved. Shepherd, *supra* note 341, at 1577-78.

for broad procedural limits on agencies' use of rulemaking and adjudication.<sup>346</sup>

The League may have provided some political cover for the Special Committee, making the Committee's efforts to rein in the New Deal state seem more moderate than the League's all-out constitutional attack. At any rate, it was after the League had faded from public view, and constitutional challenges to the New Deal had failed, that the Special Committee took over responsibility for curbing administrative government. Chaired during 1937–1938 by Roscoe Pound, who had just stepped down as Dean of Harvard Law School, the Committee issued a proposed administrative reform bill in 1938.<sup>347</sup> In 1939, the Committee's proposed legislation was introduced in Congress essentially unchanged as the Walter-Logan Act and passed both houses.<sup>348</sup> The bill would have imposed broad hearing and judicial review requirements and other limitations on agency action.<sup>349</sup> Ultimately, FDR's veto and creation of an Attorney General's Committee that would undertake further study of national administration prevented Walter-Logan's adoption.<sup>350</sup> The Special Committee's influence continued to be felt, however. The Attorney General's Committee produced majority and minority bills; the minority bill, which called for more procedural constraints, stronger judicial review, and a comprehensive administrative code, was proposed by the three dissenters including the former head of the ABA and the future Chair of the Special Committee.<sup>351</sup> Ultimately, in 1946 — after the intervention of World War II — the minority, ABA-friendly bill was largely adopted as the Administrative Procedure Act.<sup>352</sup>

3. *The Entrenchment of the National Administrative State.* — By the end of World War II and the 1940s, the basic legal postulates of the

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<sup>346</sup> *Report of the Special Committee on Administrative Law*, 62 ANN. REP. A.B.A. 789 (1937); *Report of the Special Committee on Administrative Law*, 64 ANN. REP. A.B.A. 281 (1939).

<sup>347</sup> ERNST, *supra* note 294, at 121–23; Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1630–31 (2011). For a detailed discussion of Pound's view, arguing that he did not support the proposed legislation, see ERNST, *supra* note 294, at 121–32. *But see* Kessler, *supra* note 294, at 754–57 (noting that Pound endorsed the Walter-Logan Act and disputing Ernst's account of Pound as more moderate).

<sup>348</sup> S. 915, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939).

<sup>349</sup> See GRISINGER, *supra* note 338, at 62–64; Shepherd, *supra* note 341, at 1599–600 (discussing SEC General Counsel Chester Lane's objections to the bill). The bill was watered down somewhat during the legislative process, exempting some agencies and targeting its restrictions more on those most at odds with business. ERNST, *supra* note 294, at 137.

<sup>350</sup> GRISINGER, *supra* note 338, at 64–67; *see also* Shepherd, *supra* note 341, at 1614–21, 1625–28.

<sup>351</sup> For more information on the views of the minority report drafters Carl McFarland, E. Blythe Stason, and Arthur T. Vanderbilt, see ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT 203–16 (1941).

<sup>352</sup> *See* Shepherd, *supra* note 341, at 1649; *see also* Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

modern national administrative state were firmly in place. In *Wickard v. Filburn*<sup>353</sup> in 1942, the Court had outlined the scope of national authority with breadth that still applies today: Congress can regulate intrastate activity that has a substantial effect on interstate commerce, including purely local economic activity that only affects interstate commerce when viewed in the aggregate across the nation.<sup>354</sup> Similarly, *United States v. Carolene Products Co.*<sup>355</sup> in 1938 confirmed the Court's acceptance of economic regulation and its rejection of searching due process scrutiny of economic measures.<sup>356</sup> Also by 1939, the Court had sanctioned broad congressional delegations of policymaking power to the executive branch, including delegations to private entities, with the high-water mark of broad delegation coming in *Yakus v. United States*<sup>357</sup> in 1944.<sup>358</sup> The constitutionality of administrative adjudication subject to limited judicial review, established in *Crowell v. Benson*<sup>359</sup> in 1932, was now incontrovertible and sanctioned by the APA as well as subsequent case law.<sup>360</sup> By 1937, the Court had implicitly sanctioned the combination of legislative, adjudicatory, and executive functions against separation of powers attack, and it definitively rejected a due process challenge to such combined functions in 1948.<sup>361</sup> The Court also indicated that it was sometimes willing to defer to agencies' interpretative judgments, in particular when an agency elucidated the meaning of a statutory term through application.<sup>362</sup>

<sup>353</sup> 317 U.S. 111 (1942).

<sup>354</sup> *Id.* at 125, 127–28; *see also* *NFIB v. Sebelius*, 567 U.S. 519, 552 (2012) (“*Wickard* has long been regarded as ‘perhaps the most far reaching example of Commerce Clause authority over intrastate activity.’” (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995))).

<sup>355</sup> 304 U.S. 144 (1938).

<sup>356</sup> *Id.* at 148; *see also* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (upholding a law providing minimum wages for women).

<sup>357</sup> 321 U.S. 414 (1944).

<sup>358</sup> *Id.* at 424–25; *see also* *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943) (upholding a delegation to regulate in the “public interest” under the Communications Act of 1934); *Curran v. Wallace*, 306 U.S. 1, 16–18 (1939) (upholding delegations under the Tobacco Inspection Act).

<sup>359</sup> 285 U.S. 22 (1932).

<sup>360</sup> 5 U.S.C. §§ 554, 706 (2012); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–32 (1944); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 49–53 (1936); *see also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937) (rejecting Seventh Amendment argument on the grounds that it does not apply where a “case is not a suit at common law or in the nature of such a suit”); ERNST, *supra* note 294, at 52–56 (discussing *Crowell*).

<sup>361</sup> *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629–30 (1935) (upholding the for-cause removal structure of members of the Federal Trade Commission); *see also* *United States v. Morgan*, 313 U.S. 409, 420–21 (1941) (rejecting a bias challenge against the Secretary of Agriculture, who was tasked with enforcing rules promulgated by his agency).

<sup>362</sup> *See, e.g., Hearst Publ'ns*, 322 U.S. at 130; *Gray v. Powell*, 314 U.S. 402, 411–12 (1941); *see also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) (“New Deal policymakers subscribed to . . . a prescriptive vision [under which] . . . [i]nexpert, inflexible, rule-bound courts were to recognize their

This did not mean the Court ceded all constitutional controls on administrative governance. Of particular importance, the Court periodically voiced the need for some outer congressional limit on executive authority, and concerns about the fairness of administrative hearings and executive branch overreach periodically surfaced.<sup>363</sup> But, strikingly, decisions overturning administrative arrangements and decisionmaking were based overwhelmingly on the APA and other statutory requirements, even if the Court read these statutes with an eye to constitutional concerns.<sup>364</sup> Rather than call the national administrative endeavor into constitutional question, these decisions represented an ordinary working out of its details.

The League and the Special Committee thus failed to overturn the New Deal administrative expansion. Indeed, the League has been deemed “a colossal failure”<sup>365</sup> and it never gained much popularity, being widely viewed as a foil for conservative industrial leaders seeking to protect their own economic interests. If anything, in 1936 the League likely damaged Republican presidential candidate Governor Alf Landon’s chances by association.<sup>366</sup> The conservative resistance to FDR did not start to gain real strength until 1937–1938, when the League was no longer active. This growing opposition was a result of

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proper role by allowing agencies to act with minimal judicial interference. By 1940, the federal judiciary had accepted this prescriptive model of policymaking and its reduced role in it.” (emphasis omitted)).

The Court’s jurisprudence on deference to agency statutory interpretations in this period was notoriously unclear. See *St. Joseph Stock Yards*, 298 U.S. at 78–81 (Brandeis, J., concurring) (discussing the various circumstances in which due process does and does not require de novo judicial review); Bamzai, *supra* note 245, at 978–81.

<sup>363</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting presidential power to seize steel mills absent statutory authorization); *Yakus*, 321 U.S. 414; *Morgan v. United States*, 304 U.S. 1, 18–19 (1938) (finding no fair hearing where regulated parties lacked notice of, or opportunity to respond to, government’s proposed findings, and agency prosecutors consulted *ex parte* with decisionmaker).

<sup>364</sup> See, e.g., *Kent v. Dulles*, 357 U.S. 116, 128–29 (1958) (refusing to presume Congress intended to give the Secretary of State broad discretion to refuse a passport given constitutional rights involved); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–90 (1951) (holding that the APA and the Taft-Hartley Act require courts to assess the whole record and “assume more responsibility for the reasonableness and fairness of Labor Board decisions than . . . in the past”); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40–41 (1950) (emphasizing APA concern to separate the roles of prosecutor and judge and invoking due process hearing rights in concluding that the APA’s separation of functions requirements applied to deportation hearings).

<sup>365</sup> Sheldon Richman, *A Matter of Degree, Not Principle: The Founding of the American Liberty League*, 6 J. LIBERTARIAN STUD. 145, 150 (1982); see also LICHTMAN, *supra* note 59, at 69 (discussing the lack of business response to request for further League funding); WOLFSKILL, *supra* note 310, at 62 (noting that at its peak the League had no more than 125,000 members).

<sup>366</sup> See BURK, *supra* note 302, at 236–49; Rudolph, *supra* note 311, at 31; see also President Franklin Delano Roosevelt, Acceptance Speech for the Renomination for the Presidency (June 27, 1936), 5 PUB. PAPERS 229, 233–34 (1938) (attacking “economic royalists” who opposed his candidacy, widely understood to be a reference to the League).

economic recession and FDR's overreach with his court-packing and executive reorganization plans.<sup>367</sup>

The Special Committee was more effective than the League. The ultimate enactment of the APA reflected its efforts, and the APA has played a critical role in governing the national administrative state in the years since — in particular providing an opening for extensive judicial review of administrative actions and the development of administrative law.<sup>368</sup> But the APA was only adopted once the New Deal administrative state was solidly in place, and while the statute regularized and constrained administrative practice in some respects, it is also credited with broadly legitimizing administrative governance.<sup>369</sup> In the Court's words, the APA "settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest."<sup>370</sup> Moreover, one of the central compromises built into the APA, that of imposing trial-like procedures on administrative adjudication but creating a category of informal rule-making subject only to notice-and-comment requirements, proved critical to the expansion of regulatory governance over the decades since.<sup>371</sup>

### *B. The Contemporary Relevance of the League and the Special Committee*

Eight decades later, the national administrative state has expanded significantly from its New Deal and Progressive Era roots. The 1960s and 1970s marked the addition of major Great Society programs like Medicare and Medicaid, as well as the enactment of major new social regulatory statutes addressing the environment, worker health and

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<sup>367</sup> ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 16–30* (1995); GRISINGER, *supra* note 338, at 14; BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, at 154–58, 160, 167 (1983); *see* RICHARD POLENBERG, *THE ERA OF FRANKLIN D. ROOSEVELT, 1933–1945*, at 173–80 (2000).

<sup>368</sup> *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (noting that the APA imposes a presumption in favor of judicial review); Metzger, *Embracing Administrative Common Law*, *supra* note 229, at 1314–16.

<sup>369</sup> GRISINGER, *supra* note 338, at 61–108 (discussing the political history of the APA); *see* ERNST, *supra* note 294, at 137; Sunstein & Vermeule, *supra* note 169, at 466 (describing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), as treating the APA “as an organizing charter for the administrative state — a super-statute, if you will”). *But see* PHILLIPS-FEIN, *supra* note 304, at 33–34, 53–67 (discussing sustained and growing opposition to administrative government after World War II); Kessler, *supra* note 294, at 762–73 (discussing continuing opposition to the administrative state even after adoption of the APA).

<sup>370</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

<sup>371</sup> Metzger, *Embracing Administrative Common Law*, *supra* note 229, at 1298–310 (discussing the transformation of administrative law from its textual roots in the APA); Shepherd, *supra* note 341, at 1649–75.

safety, and consumer protection.<sup>372</sup> Meanwhile, the first decade and a half of this century witnessed the national security state's dramatic growth and — albeit now under threat — new or expanded national roles in health insurance, financial regulation, and other regulatory contexts.<sup>373</sup>

Despite these changes, the history of the League and the Special Committee offers an instructive parallel for understanding and assessing contemporary anti-administrativism. The 1930s represent the first and the last time that the national administrative government was subject to the type of sustained constitutional challenge that we are seeing today. Strikingly, many of the current constitutional attacks are made in terms nearly identical to those used by the League, and the League's anti-administrative rhetoric rivals that of some members of the Roberts Court.<sup>374</sup> In addition, the legislative initiatives being offered today are closely similar to the Special Committee's proposal from eighty years before. A comparison of the Walter-Logan Act and the RAA is edifying: The Walter-Logan Act would have required a public hearing, upon request, before a rule could be adopted, while the RAA would essentially do the same for a broad range of costly rulemakings.<sup>375</sup> Walter-Logan would also have provided for broad access to judicial review and increased the stringency of judicial review, with the version that passed the House imposing a clearly erroneous standard that would have allowed courts to independently assess the record.<sup>376</sup> As noted above, the RAA — and particularly the Separation of Powers Restoration Act — would similarly expand judicial review.<sup>377</sup>

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<sup>372</sup> DECKER, *supra* note 63, at 16–25; see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272–95 (1986) (discussing regulatory politics in the Great Society and in the “Public Interest era”).

<sup>373</sup> See Dana Priest & William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/> [<https://perma.cc/7XNS-3W96>] (detailing unprecedented growth in national security programs following 9/11); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>374</sup> Compare sources cited *supra* notes 321 and 323 (describing League pamphlets discussing delegation as leading to “dictatorship” and characterizing the “Federal bureaucracy” as “a vast organism spreading its tentacles”), with sources cited *supra* notes 201, 205, 206, 216, and 217 (decrying “bureaucrats” and agencies that “pok[e] into every nook and cranny” and the “titanic administrative state” with its “vast and varied” scope and “arrogation of power”).

<sup>375</sup> Compare S. 915, 76th Cong. § 2 (1939), with S. 951, 115th Cong. § 3(e) (2017).

<sup>376</sup> See James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1093 (1940); see also Shepherd, *supra* note 341, at 1621 (noting removal of the clearly erroneous standard by the Senate but questioning whether that removal altered the scope of judicial review under the bill).

<sup>377</sup> See *supra* notes 37–46 and accompanying text.



To be sure, constitutional challenges to the modern national administrative state have surfaced more recently than the 1930s. The Reagan Administration, for example, coupled its anti-administrative political rhetoric with constitutional criticisms.<sup>378</sup> But President Reagan's constitutional legacy on administrative power is quite ambiguous. His administration advocated a narrowing in the scope of congressional authority and sought to advance this federalism agenda through executive orders and memoranda.<sup>379</sup> Yet these documents remained largely internal to the executive branch; the Reagan Administration's greatest federalism impact was indirect, through its appointment of conservative Justices to the Court.<sup>380</sup> Moreover, despite some support for property rights, the administration's states' rights focus limited its constitutional libertarianism.<sup>381</sup> On the separation of powers front, the Reagan Administration is most famous for urging the Court to adopt a unitary theory of executive power, under which the President can remove all executive branch officials and control all executive branch decisionmaking.<sup>382</sup> Such a view, though logically consistent with advocating a narrower scope to national authority, does not suggest hostility to national administrative governance so much as a desire for greater presidential control over it. And in practice, the turn to greater presidential control over administration that began with President Reagan has led to an expansion of national administrative government, as both Republican and Democratic Presidents have seized upon administration as a central means for achieving their policy goals.<sup>383</sup>

Recognizing contemporary anti-administrativism's connections to the failed challenges of the 1930s thus reinforces its radical potential; if accepted, its claims would require a reformation of the constitutional order that has governed for the last eighty years. The League and the Special Committee are equally important in highlighting the role that

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<sup>378</sup> Rosenberg, *supra* note 181, at 628–30.

<sup>379</sup> See Exec. Order No. 12,612, 3 C.F.R. 252 (1987). For example, an Office of Legal Policy memo outlining guidelines that DOJ attorneys were required to follow argued against the aggregate approach to identifying activities subject to the commerce power demonstrated in *Wickard v. Filburn*, 317 U.S. 111 (1942). See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988); see also CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 186–88 (1991) (discussing concerns for federalism in the Reagan Administration).

<sup>380</sup> Johnsen, *supra* note 65, at 387–99 (describing the content of Reagan-era Office of Legal Policy memos but noting “President Reagan's greatest influence on the development of constitutional meaning came, not through his administration's litigation positions, but through his judicial appointments,” *id.* at 397).

<sup>381</sup> Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 CHAP. L. REV. 255, 261–64 (2013) (discussing President Reagan's appointment of conservative, not libertarian, judges); W. John Moore, *Stopping the States*, NAT'L J., July 21, 1990, at 1758; see also CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 1–92 (1993).

<sup>382</sup> See *supra* note 65 and accompanying text.

<sup>383</sup> See *infra* notes 454–56 and accompanying text.

business interests and conservative forces have played, and continue to play, in fostering resistance to national administration.<sup>384</sup> As noted above, business interests benefitted far more from — and initially were far more supportive of — New Deal programs and interventions than is traditionally acknowledged. That dynamic has only continued over the years since, with many businesses working closely with national administrative government or supporting liberal policies. Today, major industry leaders are often at the forefront in pushing for greater social regulation, for example on matters affecting civil rights.<sup>385</sup> Moreover, conservative anti-administrativism has many bases, reflecting the multiple strands — business and economic conservatism, religious and social conservatism, and nationalist and military conservatism — that make up the American conservative movement.<sup>386</sup> Accounts of the Tea Party, for example, identify the close interweaving of economic conservatism and racial and ethnic resentment in the group’s anti-administrative views.<sup>387</sup> As a result, conservative antistatism often has a selective character, with simultaneous calls for reducing administrative government<sup>388</sup> and for expanding major parts of that government, in the form of the military and immigration enforcement.<sup>389</sup>

Yet it remains true that business and economic conservatives were critical in developing the New Deal attack on the modern national administrative state. They were joined in this effort by elite lawyers concerned that an expanding administrative state threatened not just their business clients’ interests but also their own livelihoods by diminishing

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<sup>384</sup> For a detailed account of this role, see PHILLIPS-FEIN, *supra* note 304, at 10–25, describing the role of the American Liberty League, and LICHTMAN, *supra* note 59, at 67–76, 128–30, 306–07, 369, describing business support for conservative groups and their antigovernment message from the 1930s through the 1980s.

<sup>385</sup> See Jena McGregor & Damian Paletta, *Trump’s Business Advisory Councils Disband as CEOs Abandon President over Charlottesville Views*, WASH. POST (Aug. 16, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils> [<https://perma.cc/NH7Y-7UN7>] (describing disbandment of the Trump Administration business councils after leading CEOs threatened to leave the councils to protest President Trump’s equivocal statements on white supremacy); Nick Wingfield, *Tech Leaders Call for Anti-Discrimination Laws to Protect Gays in All 50 States*, N.Y. TIMES: BITS (Apr. 1, 2015, 4:45 PM), <https://nyti.ms/2udqr24> [<https://perma.cc/67TH-DFZ5>].

<sup>386</sup> See James R. Kurth, *A History of Inherent Contradictions: The Origins and End of American Conservatism*, in AMERICAN CONSERVATISM: NOMOS LVI 13 (Sanford V. Levinson et al. eds., 2016).

<sup>387</sup> SKOCPOL & WILLIAMSON, *supra* note 7, at 59–60 (noting that members oppose government programs seen as benefitting the “undeserving” — a category that often includes minorities — at taxpayers’ expense, like mortgage bailouts or healthcare subsidies for the poor, but view programs with benefits felt to have been “earned,” such as Medicare and Social Security, more positively); see also ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* 214–15, 218–19 (2016).

<sup>388</sup> See Rucker & Costa, *supra* note 1.

<sup>389</sup> Katz, *supra* note 35; Michael D. Shear, *Touring Warship, Trump Pushes Plan to Expand Military*, N.Y. TIMES (Mar. 2, 2017), <https://nyti.ms/2mxfvDt> [<https://perma.cc/MAH5-F7XY>].

the importance of courts and legal representation.<sup>390</sup> It was also a few business and economic conservatives who continued to resist the national administrative state after World War II. Their opposition was based heavily in anticommunist, antilabor, and anticollectivist sentiments, and they were clearly a distinct minority — not just in American society, but also within the business community.<sup>391</sup> Over the course of the following decades, however, business conservatives moved from fringe to center, drawing on business opposition to the expansion of social regulation, public interest litigation, and public protests in the 1960s and 1970s.<sup>392</sup> In 1971, soon-to-be Justice Lewis Powell penned his famous memo to the Chairman of the Chamber of Commerce’s Education Committee, calling for a litigation strategy to defend business interests and the capitalist system.<sup>393</sup> In historian Kim Phillips-Fein’s words, the conservative business organizations created in response represent “the fulfillment, in a quiet way, of the long-ago vision of the Liberty League.”<sup>394</sup>

The fruits of Powell’s strategic legal vision are evident in contemporary anti-administrativism. Business interests are particularly tied to regulatory rollbacks occurring under the Trump Administration and in Congress,<sup>395</sup> and business associations like the Chamber of Commerce and the National Federation of Independent Business (NFIB) are frequent participants in litigation challenging administrative action.<sup>396</sup>

<sup>390</sup> See Shepherd, *supra* note 341, at 1571–72.

<sup>391</sup> LICHTMAN, *supra* note 59, at 1–3 (noting the centrality of anticommunist sentiments to the conservative movement); PHILLIPS-FEIN, *supra* note 304, at 22–25, 33, 56–67, 87–114 (detailing the relationship between conservatives and McCarthyism, anticommunism, and antilabor); see also ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 102–22* (2012) (discussing the diverse interests that went into the formation of Friedrich Hayek’s Mont Pelerin Society).

<sup>392</sup> DECKER, *supra* note 63, at 39–72; PHILLIPS-FEIN, *supra* note 304, at 150–212, 236–62; TELES, *supra* note 187, at 60–63; Paul Pierson, *The Rise and Reconfiguration of Activist Government*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM 19* (Paul Pierson & Theda Skocpol eds., 2007); Julian E. Zelizer, *Seizing Power: Conservatives and Congress Since the 1970s*, in *THE TRANSFORMATION OF AMERICAN POLITICS*, *supra*, at 105, 111.

<sup>393</sup> Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, *Attack on American Free Enterprise System* (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<https://perma.cc/8X5P-MRG3>]; LICHTMAN, *supra* note 59, at 303. For a list of foundations behind the funding of the Chamber of Commerce, see LICHTMAN, *supra* note 59, at 305.

<sup>394</sup> PHILLIPS-FEIN, *supra* note 304, at 266.

<sup>395</sup> See Ivory & Faturechi, *supra* note 28; see also William Kovacs, *Opinion, Separating Fact from Fiction in the Regulatory Accountability Act*, *THE HILL* (May 18, 2017, 7:00 PM), <http://thehill.com/blogs/pundits-blog/uncategorized/334136-separating-fact-from-fiction-in-the-regulatory> [<https://perma.cc/LR8U-QTKS>] (demonstrating Chamber of Commerce support for the RAA).

<sup>396</sup> See Memorandum from Zachary Bannon on Lawyers and Organizations in Administrative Challenges to Gillian Metzger (May 11, 2017) [hereinafter Bannon] (on file with the Harvard Law

Just as a network of business lawyers was behind litigation challenging the New Deal, so too a group of lawyers appears frequently in the current judicial attacks.<sup>397</sup> They are joined by a number of conservative think tanks and “attorney-activists” committed to challenging the national regulatory state.<sup>398</sup> Conservative institutions also provide support for scholarship challenging the administrative state, helping to bring these conservative ideas more into the academic mainstream.<sup>399</sup> This is in keeping with extensive conservative efforts since the 1970s to develop and foster a field of lawyers, academics, and judges to advance the conservative legal agenda — nowhere more evident than in the central role of the Federalist Society’s Leonard Leo in pushing then-Judge Gorsuch for the Supreme Court.<sup>400</sup> And as with the League, over the years a few wealthy conservative donors, using business-created fortunes, have provided extensive resources to support these efforts.<sup>401</sup>

The parallels to the 1930s are perhaps nowhere stronger than with respect to Charles and David Koch, the modern-day equivalents of the Du Pont brothers.<sup>402</sup> The Koch brothers’ funding extends to a wide range of organizations associated with contemporary anti-administrativism, from conservative political organizations like the Tea Party, Americans for Prosperity, and FreedomWorks; to the libertarian Cato Institute and the conservative Heritage Foundation; to George Mason University and even more specifically George Mason’s Antonin Scalia Law School, just to name a few.<sup>403</sup> Their engagement reflects a clear

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School Library) (listing firms, counsel, and organizations involved in litigation described in section I.B); see also Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), <https://nyti.ms/2lGVrg6> [<https://perma.cc/M6BZ-VJJ5>] (detailing the Chamber of Commerce’s involvement and success in litigation before the Supreme Court).

<sup>397</sup> See Bannon, *supra* note 396; see also Savit, *supra* note 196, at 855–56 (detailing the role of Republican state attorneys general in litigation challenging Obama administrative regulations).

<sup>398</sup> DECKER, *supra* note 63, at 220–21.

<sup>399</sup> See, e.g., Steve Eder, *Neomi Rao, the Scholar Who Will Help Lead Trump’s Regulatory Overhaul*, N.Y. TIMES (July 9, 2017), <https://nyti.ms/2uZnKnz> [<https://perma.cc/R8NG-CNY6>] (detailing the Charles Koch Foundation’s significant contribution to the Antonin Scalia Law School’s Center for the Study of the Administrative State); Adam White, *Welcome to the Center for the Study of the Administrative State*, CTR. FOR STUDY ADMIN. ST., ANTONIN SCALIA L. SCH., GEO. MASON U., <https://administrativestate.gmu.edu> [<https://perma.cc/9328-ULNP>] (identifying current “[p]roblems of administrative accountability,” “the growth of the federal government outside the checks and balances of the Constitution,” and the “heavy economic, political, and social costs” of regulation as the focus of the Center’s study).

<sup>400</sup> Eric Lipton & Jeremy W. Peters, *In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary*, N.Y. TIMES (Mar. 18, 2017), <https://nyti.ms/2nDbryT> [<https://perma.cc/JAK3-D3BS>]; Toobin, *supra* note 19.

<sup>401</sup> LICHTMAN, *supra* note 59, at 305; Savit, *supra* note 196, at 857–61.

<sup>402</sup> See Frank Rich, *Opinion, The Billionaires Bankrolling the Tea Party*, N.Y. TIMES (Aug. 28, 2010), <https://nyti.ms/2jHYWmo> [<https://perma.cc/6UKQ-LABL>].

<sup>403</sup> JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 2–10, 149–56, 178–85 (2016); SKOCPOL & WILLIAMSON,

strategy of seeking to reshape the nation's intellectual and constitutional backdrop.<sup>404</sup> They have pursued this strategy particularly with respect to global warming, wielding political candidate funding and broader institutional funding to change the background terms of debate as well as oppose particular regulatory initiatives.<sup>405</sup>

In short, as was true in the 1930s, business conservatives' support has been critical to the growing prominence of contemporary anti-administrativism. Moreover, this growing prominence suggests that the strategy of business conservatives like the Koch Brothers is working. To use Professor Jack Balkin's terms, this strategy has moved the conservative constitutional critique from "off the wall to on the wall."<sup>406</sup> In this regard, a historical discontinuity with the 1930s emerges. The League not only failed to generate popular support for its constitutional arguments, but also by its own unpopularity contributed to Roosevelt's landslide win in 1936.<sup>407</sup>

Finally, the League and the Special Committee are significant in demonstrating the inescapably political aspect of the current constitutional attack on administrative government. Despite the League's wrapping itself in the Constitution, no one doubted the political and economic interests that motivated its members or the lawyers on the NLC. The members of the Special Committee were similarly seen as acting in their business clients' interests. Their attacks on administrative government reflected disagreement with New Deal policies, in particular New Deal economic reforms and support for labor.<sup>408</sup> Against the background of the League and the Special Committee, the current attack appears as the latest in a series of conservative attempts to rein in national administrative government that have recurred over the past eighty years. From this perspective, it is not a coincidence that the current attack on the administrative state rose to the fore during a period

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*supra* note 7, at 102–04, 174 (describing Koch funding of the Tea Party); Nicholas Fandos, *University in Turmoil over Scalia Tribute and Koch Role*, N.Y. TIMES (Apr. 28, 2016), <https://nyti.ms/2lqzNNr> [<https://perma.cc/8ZXQ-PFJ8>] (detailing Koch connections to George Mason University, including funding of the Mercatus Center, a libertarian economic think tank).

<sup>404</sup> MAYER, *supra* note 403, at 171; Eder, *supra* note 399; Fandos, *supra* note 403.

<sup>405</sup> See Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), <https://nyti.ms/2rDMtna> [<https://perma.cc/JNM7-4XSC>]; Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013, 11:06 AM), <http://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/> [<https://perma.cc/X3E4-9TXC>].

<sup>406</sup> Balkin, *From Off the Wall to On the Wall*, *supra* note 293 (discussing "the history of formerly crazy arguments moving from off the wall to on the wall, and then being adopted by courts" in the context of *NFIB v. Sebelius*, 567 U.S. 519 (2012)).

<sup>407</sup> See *supra* notes 314–15 and accompanying text.

<sup>408</sup> See Landis, *supra* note 376, at 1078, 1089 (emphasizing economic interests behind the Walter-Logan Act); Shepherd, *supra* note 341, at 1560 ("[A] central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and [the] Securities and Exchange Commission.").

of activist government and progressive regulatory initiatives by the Obama Administration.

Acknowledging this political character is not to deny contemporary anti-administrativism's deep constitutional roots. It is instead to deny the inseparability of politics from efforts to mold the constitutional contours of the American state. Constitutional scholars often distinguish between constitutional interpretation, identified as a more text-based endeavor of discerning constitutional meaning, and broader efforts at "constructing" constitutional meaning: "The process of constitutional construction is concerned with fleshing out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the [C]onstitution."<sup>409</sup> Moreover, constitutional construction is an inherently political as well as judicial activity, with "[t]he political branches build[ing] out the Constitution through everyday politics."<sup>410</sup> The League and the Special Committee were part of such a process of constitutional construction in the 1930s, which ultimately resulted in constitutional acceptance of the national administrative state and the APA regime.<sup>411</sup> Contemporary anti-administrativism may be best understood as another effort at constitutional construction, seeking to revise the reigning constitutional order and build a version of the national state more in keeping with conservative principles.<sup>412</sup> Viewing contemporary anti-administrativism in this way underscores the deep connections between its political, judicial, and academic varieties. To succeed, contemporary anti-administrativism will need to bring about broad-ranging changes in national institutions and constitutional culture.

Yet this political overlay poses a particular challenge for contemporary judicial anti-administrativism. Even if clothed in constitutional garb, judicial efforts to cut back on administrative governance will inevitably be seen in political terms, as part of an ongoing national struggle between conservatism and progressivism. That framing was clearly on display at Justice Gorsuch's confirmation hearings, where references

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<sup>409</sup> Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120 (2010); see also JACK M. BALKIN, LIVING ORIGINALISM 3–6, 69–73 (2011) ("Constitutional construction, however, involves far more than developing doctrines and precedents that implement the Constitution. All three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society." *Id.* at 5.); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010) (describing interpretation as "the activity that aims at discovery of the linguistic meaning" of the Constitution, *id.* at 101, and construction as giving "legal effect to the semantic content of a legal text," *id.* at 103).

<sup>410</sup> BALKIN, *supra* note 409, at 298.

<sup>411</sup> See *supra* pp. 58–59.

<sup>412</sup> Sunstein & Vermeule, *supra* note 8, at 46–54.

to *Chevron* deference surfaced frequently during the four days of congressional questioning and in public commentary.<sup>413</sup> *Chevron* in this context served as a stand-in for administrative government writ large, with overt connections drawn to conservative political campaigns against the administrative state.<sup>414</sup> The Roberts Court separately has gained a reputation as a pro-business court, thereby reinforcing perceptions of it as antiregulatory.<sup>415</sup> And it has been increasingly politically polarized, with the Justices divided into conservative and liberal blocs that overwhelmingly vote together in ideologically contentious cases.<sup>416</sup> Politicization of the Court generally reached an apogee in 2016, with Republicans limiting the Court to eight Justices for over a year in a successful effort to control the appointment of Justice Scalia's successor. This external politicization may have served to dampen polarization within the Court, with the 2016 Term setting recent records for consensus and its low number of ideologically split decisions. But this was in part a result of the Court's avoiding more ideologically contentious issues and seems unlikely to last, given the number of such cases already on the docket for next year.<sup>417</sup>

Put together, all of this might suggest that the Court risks long-lasting institutional harm were it to follow through on its anti-administrative rhetoric and significantly cut back the administrative

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<sup>413</sup> See Gorsuch Confirmation Hearings (Day 1), *supra* note 15 (opening statements by Sens. Feinstein, Klobuchar, and Franken); *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States (Day 4)*, S. COMM. ON THE JUDICIARY at 3:51:48 (Mar. 23, 2017), <https://www.judiciary.senate.gov/hearings/watch?hearingid=A164B791-5056-A066-60D6-FF2C148F66C9> [<https://perma.cc/B7L4-MASN>] (testimony by Professor Jonathan Turley on *Chevron* and administrative government); *id.* at 3:57:25 (testimony by Sierra Club Environmental Law Program Director Pat Gallagher on *Chevron* and administrative government); *id.* at 4:02:21 (testimony by NFIB Small Business Legal Center Executive Director Karen Harned on *Chevron* and administrative government).

<sup>414</sup> See, e.g., Tessa Berenson, *How Neil Gorsuch Could Dramatically Reshape Government*, TIME (Mar. 19, 2017), <http://time.com/4701114/neil-gorsuch-confirmation-hearing-chevron-doctrine/> [<https://perma.cc/8B7M-T84Z>]; Allan Smith, *Trump's Supreme Court Nominee Just Had His First Real Day of Grilling — And There's More to Come*, BUS. INSIDER (Mar. 22, 2017, 9:01 AM), <http://www.businessinsider.com/neil-gorsuch-senate-confirmation-hearing-2017-3> [<https://perma.cc/L2EP-PPK4>].

<sup>415</sup> See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (concluding that “the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts”); see also Jonathan H. Adler, *Introduction: In Search of the Probusiness Court*, in BUSINESS AND THE ROBERTS COURT 1, 11–12 (Jonathan H. Adler ed., 2016) (“[W]hile there is little evidence the Court seeks to help business, as such, there are aspects of the Court’s dominant jurisprudence that work to the advantage of business interests.”).

<sup>416</sup> See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. (forthcoming 2017), <https://ssrn.com/abstract=2432111> [<https://perma.cc/9FRH-K2J7>].

<sup>417</sup> See Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. TIMES (June 27, 2017), <https://nyti.ms/2uci8Kw> [<https://perma.cc/DXF9-METV>].

state. The 1930s offer an interesting parallel here as well, in the institutional threat that the Court faced as a result of its opposition to the early New Deal. To be sure, the contemporary political climate is dramatically different from the 1930s. FDR's 1936 mandate made clear that the Court stood at odds with overwhelming national sentiment in favor of more active national government and that broad support existed for the Court changing its stances, even if FDR's court-packing plan raised popular concerns.<sup>418</sup> Today, national politics are deeply divided, and contemporary anti-administrativism appears to resonate with a sizeable part of the electorate. In pushing anti-administrativism, then, the Court is not at risk of being out of sync with most of the nation. Instead, the institutional risk it faces is of being viewed increasingly as nothing more than another arena for political combat.

### III. 1930S REDUX II: THE ADMINISTRATIVE STATE AND EXECUTIVE POWER

Contemporary anti-administrativism's core constitutional attack is that the national administrative state enables the exercise of unaccountable and aggrandized executive power: Unelected bureaucrats wield a combination of de facto legislative, judicial, and executive powers outside of meaningful political or judicial constraint.<sup>419</sup> Contemporary anti-administrativists differ on whether the result is modern-day tyranny or, more moderately, a system of government in tension with the Constitution's commitment to separating and checking governmental power in the name of individual liberty.<sup>420</sup> Either way, the national administrative state is painted as constitutionally suspect.

Anxieties about executive power are understandable, particularly in our current era of presidential unilateralism and a seemingly hamstrung Congress. But the anti-administrativists' analysis gets the constitutional diagnosis almost exactly backward. The administrative state — with

<sup>418</sup> FRIEDMAN, *supra* note 337, at 3–5, 202–34.

<sup>419</sup> See *supra* pp. 36–37. Other constitutional concerns are that the administrative state violates constitutional limits on national power and individual economic rights, but as noted above these concerns are less developed in current judicial challenges and surface more in academic commentary. See *supra* pp. 29–32.

<sup>420</sup> Compare, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“It would be a bit much to describe the result as . . . tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed.” (internal quotations omitted)), *with* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.” (alterations in original) (quoting THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003))), and *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”).



its bureaucracy, expert and professional personnel, and internal institutional complexity — performs critical constitutional functions and is the key to an accountable, constrained, and effective executive branch. Indeed, far from being constitutionally suspect, the administrative state today is constitutionally obligatory, rendered necessary by the broad statutory delegations of authority to the executive branch that are the defining feature of modern government. Those delegations are here to stay; only the most extreme and resolute anti-administrativists are willing to suggest their invalidation, and the Supreme Court has almost never done so. From delegation, however, core features of the national administrative state follow.<sup>421</sup>

*A. The Brownlow Committee and Presidential Administration*

The 1930s are again a useful starting point for assessing the relationship between the administrative state and executive power. Two prominent accounts of this relationship — one arguing for strong presidential control of administrative government, the other emphasizing administrative expertise and specialization — were offered in 1937 and 1938, respectively. Although competing in important ways, these two accounts shared a central insight: that the administrative state was the key to ensuring accountable as well as effective exercise of executive power and guarding against its abuse. More importantly, both these accounts remain relevant today, with their combined insights capturing important constitutional functions that the administrative state performs.

Notwithstanding FDR's disdain for the Liberty League, he accepted the proposition that New Deal agencies needed more oversight. In 1936, he commissioned a committee of public administration experts, headed by Louis Brownlow, to study administration and management in the executive branch and propose recommendations.<sup>422</sup> Issued nearly one year later in January 1937, the Brownlow Committee's report sounded concerns strongly resonant with the anti-administrativists of its era and today. Despite its commitment to the New Deal, the Brownlow

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<sup>421</sup> An extraordinary body of constitutional scholarship addresses whether the administrative state can accord with the Constitution's text, structure, precedent, and history — including recently within the pages of the Foreword. See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014). I am not going to repeat those efforts here; the debate has been waged as ably and exhaustively as it can be, and were I to try to list all of the important articles in this area, this would be the footnote that ate the Foreword. Framing analysis around the question of whether the administrative state is constitutional injects hesitancy about its constitutional status from the outset. My goal, instead, is to reframe the analysis by focusing on the administrative state's constitutional benefits.

<sup>422</sup> For background on the Committee and its three members, see generally BARRY DEAN KARL, *EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL* (1963), and RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT* 3–27 (1966).

Committee warned of the “dangers of bureaucracy”<sup>423</sup> and viewed “safeguarding . . . the citizen from narrow-minded and dictatorial bureaucratic interference and control [a]s one of the primary obligations of democratic government.”<sup>424</sup> It particularly attacked the independent regulatory commissions, for which it coined the phrase the “headless ‘fourth branch,’” arguing that their lack of political accountability and requirement that “the same men . . . serve both as prosecutors and as judges” did “violence” to the Constitution’s tripartite separation of powers structure.<sup>425</sup> Expanding presidential control over New Deal administration was the Committee’s core solution, putting it diametrically at odds with the League and the Special Committee but on a page with *Free Enterprise*’s insistence on the need for “oversight by an elected President.”<sup>426</sup> The Brownlow Committee similarly insisted that greater presidential control was essential for democracy and self-government, proclaiming that “[t]he President is . . . the one and only national officer representative of the entire Nation.”<sup>427</sup>

Yet the Brownlow Committee differed starkly from anti-administrativists in viewing the administrative state itself as the critical means for obtaining accountability through the President. It sought to consolidate the executive branch and individual agencies’ structures, expanding centralized managerial, fiscal, and planning capacity under “a responsible and effective chief executive as the center of energy, direction, and administrative management.”<sup>428</sup> The Brownlow Committee urged expanding the White House staff under the cry of “[t]he President needs help,”<sup>429</sup> and also insisted on the need to expand the civil service “upward, outward, and downward,”<sup>430</sup> arguing that “[d]emocratic government today, with its greatly increased activities and responsibilities, requires personnel of the highest order.”<sup>431</sup> The Committee also viewed “centralizing the determination of administrative policy [so] that there is a clear line of conduct laid down for all officialdom to follow,” along with “decentralizing the actual administrative operation,” as essential to accountable government.<sup>432</sup> Even more, the Brownlow Committee was adamant on the need for active administrative government: “A weak administration can neither advance nor retreat successfully — it can

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<sup>423</sup> PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 8 (1937) [hereinafter BROWNLOW REPORT].

<sup>424</sup> *Id.* at 30.

<sup>425</sup> *Id.* at 36.

<sup>426</sup> 561 U.S. 477, 499 (2010).

<sup>427</sup> BROWNLOW REPORT, *supra* note 423, at 1.

<sup>428</sup> *Id.* at 2.

<sup>429</sup> *Id.* at 5.

<sup>430</sup> *Id.* at 7–8.

<sup>431</sup> *Id.* at 7.

<sup>432</sup> *Id.* at 30.

merely muddle. Those who waver at the sight of needed power are false friends of modern democracy."<sup>433</sup>

Roosevelt sent proposed legislation incorporating the Brownlow Committee's recommendations to Congress in early 1937, just a few weeks before he submitted his court-packing plan. Controversial in its own right, the Brownlow legislation soon was attacked for being part of a broader effort by FDR to seize dictatorial powers and was never enacted.<sup>434</sup> Interestingly, the Brownlow legislation also faced opposition from New Deal supporters, most notably James Landis, Chair of the SEC until 1937 and eventual Dean of Harvard Law School.<sup>435</sup> In 1938, Landis wrote what remains the classic defense of administrative government, *The Administrative Process*, taking direct aim at the Brownlow Committee Report.<sup>436</sup> Landis attacked the Brownlow Committee's effort to centralize control of administrative government in the President as well as its insistence on fitting administrative government within the traditional separation of powers framework. In lieu of presidential control, Landis offered expertise, specialization, and effective regulation as the primary keys to the accountability of administrative government.<sup>437</sup> He also defended the combination of powers held by modern administrative agencies as essential to meeting the regulatory challenges of a modern industrial economy, famously decrying "the inadequacy of a simple tripartite form of government to deal with modern problems."<sup>438</sup> Yet for all that, Landis shared more points of agreement with the Brownlow Committee than he acknowledged. Professional and expert staff as well as administrative structure were central to both of their accounts, with Landis emphasizing the protections provided by internal procedure in defending administrative adjudication.<sup>439</sup> Both also underscored the practical realities that limited the value of external checks on the executive branch and insisted that effective administrative government had become a prerequisite of democracy.<sup>440</sup>

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<sup>433</sup> *Id.* at 47.

<sup>434</sup> See BRINKLEY, *supra* note 367, at 22; Shepherd, *supra* note 341, at 1585–86. For a detailed account of the debate over the Brownlow legislation, see generally POLENBERG, *supra* note 422, at 125–88. Despite the failure of the Brownlow legislation, presidential reorganization powers were expanded in 1939 and, a decade later, the Hoover Commission on Organization of the Executive Branch of the Government significantly expanded presidential administrative control. See HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT 88–90 (1971).

<sup>435</sup> Mariano Florentino-Cuéllar, *James Landis and the Dilemmas of Administrative Government*, 83 GEO. WASH. L. REV. 1330, 1331, 1334–35 (2015).

<sup>436</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 4–5, 47 (1938).

<sup>437</sup> *Id.* at 23, 28–30, 98–100, 111; see also VERMEULE, *supra* note 147, at 39, 62–63.

<sup>438</sup> LANDIS, *supra* note 436, at 1; *id.* at 10–14, 91–98.

<sup>439</sup> *Id.* at 101–11.

<sup>440</sup> *Id.* at 8–9, 30–31, 34–38; BROWNLOW REPORT, *supra* note 423, at 47.

Landis won this battle in the 1930s, and the independent expertise model of the administrative state dominated the post–World War II era.<sup>441</sup> In the end, however, the Brownlow Committee won the war, with presidential power over the administrative state rising to the fore beginning with the Reagan Administration. Presidents have achieved this control by following the Brownlow Committee’s advice on expanding centralized administrative capacity.<sup>442</sup> But Presidents have deviated markedly from the Committee’s recommendations by also extensively politicizing agency staff instead of expanding the civil service.<sup>443</sup> Even independent agencies are also now recognized to be more susceptible to presidential influence — and to be more varied in the extent of their independence — than the Brownlow Committee and Landis ever envisioned.<sup>444</sup> The benefits and harms of this growth in presidential power continue to be as strongly debated as in the 1930s, but presidential administration has become the central reality of the contemporary national government.<sup>445</sup>

Presidential administration, in turn, has accentuated the risk of executive branch unilateralism and aggrandizement.<sup>446</sup> The Brownlow

<sup>441</sup> Schiller, *supra* note 362, at 404, 406.

<sup>442</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 486–91 (2003).

<sup>443</sup> See Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235, 235, 239 (John E. Chubb & Paul E. Peterson eds., 1985) (describing techniques of politicization and centralization). See generally DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (2008) (discussing the possible causes of increased politicization and providing a quantitative analysis of the level of politicization in federal offices).

<sup>444</sup> For descriptions of the ways and success with which Presidents can exercise control over independent agencies, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 818–24 (2013), and Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491–98 (2008).

<sup>445</sup> Compare Kagan, *supra* note 191, at 2331–46 (arguing that presidential direction is important for political accountability, cost-effectiveness, priority setting, and energy), and Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (asserting that presidential direction is constitutionally required), with SHANE, *supra* note 192, at 3–5 (expressing concern over the growing concentration of power in the federal executive and the dangers it raises), and Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) (contending that the idea of political accountability through presidential control is unduly simplistic), and Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. (forthcoming 2018) (manuscript at 82–93), <https://ssrn.com/abstract=3018618> [<https://perma.cc/TSH3-Y2AQ>] (expressing skepticism about presidential administration yielding benefits in energy or accountability and noting the lack of durability of recent aggressive presidential assertions of power as well as the judicial anxiety they have aroused). See generally Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

<sup>446</sup> See Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 851–52 (1999); Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL. 495, 499–502 (2003).

Committee's exaltation of the President may have been ahead of its time, but Presidents today are even more the focus of popular expectations for government. Presidents increasingly are "held responsible for designing, proposing, legislating, administering, and modifying public policy . . . [Hence, a President's] chances for reelection, . . . standing with opinion leaders and the public, and . . . historical legacy all depend on . . . perceived success as the generalized leader of government."<sup>447</sup> Presidents thus face strong "incentives to develop and expand their power in whatever ways they can."<sup>448</sup> And, given the vast powers statutorily delegated to the executive branch, a prime means by which Presidents seek to push their policies is through their control over administration.<sup>449</sup> They are further encouraged to do so by the institutional and political realities that make enactment of legislation to overturn administrative decisions difficult. The process of passing a bill in both houses — especially given the need to get through the committee process and to reach a supermajority of sixty votes in the Senate to avoid a filibuster — and then securing presidential agreement or overturning a veto is hard enough. But the intense political and ideological divisions of our current era raise an often insurmountable barrier for significant legislation, sometimes even when the national government is under unified party control and only more so when not.<sup>450</sup>

The claim of unilateralism here is a qualified one. Most importantly, Presidents and agencies rely on underlying statutes for their authority to act and face the possibility of judicial invalidation if they overstep that authority.<sup>451</sup> Congress is hardly stuck on the sidelines. Over the

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<sup>447</sup> Moe, *supra* note 443, at 239; see also Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1882–83 (2016) (reporting on empirical evidence that the public credits Presidents for successful administrative action and blames them for administrative failures). *But see* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (questioning whether Presidents have the nationwide popular focus they are conventionally thought to have).

<sup>448</sup> Moe & Howell, *supra* note 446, at 854.

<sup>449</sup> See Kagan, *supra* note 191, at 2272–319; Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 693–703 (2016).

<sup>450</sup> See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 91–97 (2015); Metzger, *Agencies, Polarization, and the States*, *supra* note 66, at 1748–52; Gerald F. Seib, *As Donald Trump Heads to Congress, a New Polarization Is Hardening*, WALL ST. J. (Feb. 27, 2017, 5:22 PM), <https://www.wsj.com/articles/as-donald-trump-heads-to-congress-a-new-polarization-is-hardening-1488212273> [<http://perma.cc/UJ7M-7V3F>]. Other factors fuel new presidential assertions of control as well, such as the need to coordinate multiple administrative actors and overlapping regimes. See Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1830–32 (2015) (noting that "horizontal administrative complexity" has empowered OIRA).

<sup>451</sup> See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 3 (2014) ("Agencies . . . do not simply 'go for broke' . . . Instead they proceed strategically, cognizant of the preferences of their political overseers and the risk of being overturned in the courts."); Andrew Rudalevige, *Old Laws, New Meanings: Obama's Brand of Presidential "Imperialism,"* 66 SYRACUSE L. REV. 1, 7–15 (2016); Peter M. Shane, *The Presidential Statutory Stretch and the*

last decade, it has enacted several major regulatory reform statutes and it retains the ability to influence and constrain the executive branch, whether through hearings, investigations, appropriations, or by refusing to move on legislation or appointments that a President seeks.<sup>452</sup> Public opinion can be a potent force as well, with claims that the executive branch has abused its power or exceeded its statutory authority capable of generating substantial political pushback.<sup>453</sup>

Even so, Presidents are able to use their oversight of the executive branch to set the national agenda and single-handedly push national policy in significant new directions.<sup>454</sup> President Obama's open embrace of administrative power to advance his second-term agenda is a prime example of this phenomenon.<sup>455</sup> Yet in strongly asserting presidential power over administration, Obama was following in the immediate footsteps of President Bush, and President Trump is already pursuing the same path as well.<sup>456</sup> Partisanship affects how Presidents wield their power over administration — whether they seek to foster regulation or stymie it, for example — but not whether they assert such power in the first place.

### B. *The Administrative State's Constitutional Functions*

This potential for presidentially driven administrative unilateralism and aggrandizement suggests limitations in relying on presidential control alone to guard against abuse of executive power. Yet the often over-

*Rule of Law*, 87 U. COLO. L. REV. 1231, 1235–49 (2016) (describing this dynamic under the Reagan, Clinton, and George W. Bush presidencies).

<sup>452</sup> See, e.g., Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 295, 297 (2008) (describing increases in congressional hearings and investigations in times of divided government); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767, 773 (2010) (discussing increased use of appropriation riders); Seung Min Kim & Burgess Everett, *Senate Dems Plan to Drop Nominations Blockade if Health Bill Fails*, POLITICO (July 25, 2017, 12:36 PM), <http://www.politico.com/story/2017/07/25/senate-democrats-drop-nomination-blockage-after-health-care-bill-240939> [<https://perma.cc/SEE2-JC96>] (describing how Senate Democrats had stalled confirmations of President Trump's nominees as long as Obamacare repeal was pending).

<sup>453</sup> Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1409–14 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010)).

<sup>454</sup> Kagan, *supra* note 191, at 2281–84 (discussing examples of presidential agenda setting in the Clinton Administration); Watts, *supra* note 449, at 706–20 (discussing examples in the George W. Bush and Obama Administrations).

<sup>455</sup> Freeman & Spence, *supra* note 451, at 17–31; Kenneth S. Lowande & Sidney M. Milkis, “*We Can’t Wait*”: *Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3, 21–24 (2014); Rudalevige, *supra* note 451, at 4.

<sup>456</sup> See Farber, *supra* note 29 (describing President Trump's approach); Watts, *supra* note 449, at 693–706 (discussing centralized control under George W. Bush and Obama); see also Kagan, *supra* note 191, at 2277–82, 2315–17 (describing expanded presidential administration under the earlier Reagan and Clinton presidencies).

looked feature of the Brownlow Committee's approach was its recognition that *both* presidential control *and* bureaucracy were essential for accountable government.<sup>457</sup> Even more accurate is the picture that emerges from combining the Committee's insights with those of Landis. It is the internal complexity of the administrative state — the way it marries together presidential control, bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like — that holds the key to securing accountable, constrained, and effective exercise of executive power.

These features of the administrative state are not just beneficial in a good government sense. They also carry constitutional significance, both in satisfying constitutional structural requirements and in ensuring that broader separation of powers principles retain force in the world of contemporary governance. By thus implementing the separation of powers, the administrative state performs an essential constitutional function.

1. *Bureaucratic Supervision and Internal Constraints.* — Consider first the managerial supervision and oversight that the Brownlow Committee emphasized, which occur both within agencies and at a centralized level across the executive branch. This kind of bureaucratic accountability is necessary to guarantee both that low-level personnel enforce politically determined policy and that important information about administrative activity reaches high-level political officials.<sup>458</sup> Internal supervision is equally critical to ensuring that the executive branch acts in a lawful manner. Judicial review of agency action can articulate legal requirements, but only managerial oversight and supervision can translate judicial decisions into agency policies and actions. Moreover, internal oversight and supervision reach a far broader array of agency action than courts can, and are able to prevent unlawful agency actions from occurring in the first place, whereas courts are largely reactive.<sup>459</sup>

Indeed, as Mashaw has long argued, the body of internal instructions, guidance, and procedures developed through operation of bureaucratic accountability is itself a form of law — the internal law of the administrative state.<sup>460</sup> For the most part, these measures are not subject to judicial enforcement, but they are law-like in that they are perceived as binding and internally enforced as such within agencies. By

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<sup>457</sup> See *supra* notes 422–33 and accompanying text.

<sup>458</sup> Rubin, *supra* note 198, at 2119–34.

<sup>459</sup> Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–58 (2017); see also LANDIS, *supra* note 436, at 123 (“Courts are not unconscious of the fact that, due to their own inadequacies, areas of government formerly within their control have been handed over to administrative agencies for supervision.”).

<sup>460</sup> MASHAW, *supra* note 245, at 223.

rising above the level of specific actions and embodying officials' general views on governing statutes and policies, these measures also foster important rule-of-law values such as consistency, coherence, authorization, justification, and nonarbitrary governmental action.<sup>461</sup> In the Brownlow Committee's words, centralizing and specifying policy "for all officialdom to follow" is essential to prevent "narrowminded and dictatorial bureaucratic interference and control."<sup>462</sup>

In short, the mechanisms of bureaucratic accountability are central to achieving political and legal accountability of government.<sup>463</sup> Moreover, both political and legal accountability are generally acknowledged to have a constitutional basis. Political accountability is embedded in the Constitution's electoral provisions, commitment to self-government, and grants of legislative power to an elected Congress and executive power to an elected President.<sup>464</sup> Legal accountability is a more implicit but equally central structural premise, embodied in the idea of a constitutionally controlled government and represented in the President's obligation to faithfully execute the law.<sup>465</sup> This means, in turn, that bureaucratic accountability also has constitutional salience: It provides the mechanisms to realize constitutionally mandated political and legal accountability. Equally constitutionally consequential is the role that bureaucratic oversight plays in guarding against abuse of executive power by ensuring consistent, coordinated governmental action.

Yet the constitutional significance of oversight and supervision goes further. As I have argued elsewhere, the Constitution itself imposes a duty to supervise on government officials.<sup>466</sup> This duty is most clearly embodied in Article II's direction that the President "shall take Care that the Laws be faithfully executed."<sup>467</sup> But it also manifests as a broader structural requirement, implicit in the repeated constitutional invocations of hierarchical oversight relationships in contexts of delegated power.<sup>468</sup> Such a duty to supervise is additionally rooted in due process's prohibition on arbitrary exercise of governmental power, given the need for oversight and managerial control to ensure that delegated

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<sup>461</sup> Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 413 (2007); Metzger & Stack, *supra* note 459, at 1256–66; Rubin, *supra* note 198, at 2075.

<sup>462</sup> BROWNLOW REPORT, *supra* note 423, at 30.

<sup>463</sup> Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–99.

<sup>464</sup> See U.S. CONST. pmbl.; *id.* art. I, §§ 1–3; *id.* art. II, § 2, cl. 2.

<sup>465</sup> *Id.* art. II, § 3; Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1891.

<sup>466</sup> Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1874–1933.

<sup>467</sup> U.S. CONST. art. II, § 3.

<sup>468</sup> Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–97.



power is not used abusively or arbitrarily.<sup>469</sup> Recognizing this constitutional demand for supervision may come most naturally to unitary executives, but the duty to supervise is not limited to the President and extends throughout the executive branch as well as Congress. The bureaucratic oversight mechanisms of the administrative state represent the core means through which the constitutional duty to supervise is satisfied.

Where the Brownlow Committee emphasized top-down bureaucratic supervision, Landis connected accountability more to bottom-up and horizontal aspects of the administrative state.<sup>470</sup> Professor Jon Michaels has recently elaborated a horizontal account of the administrative state as composed of different forces and interests, that are often rivalrous and check each other's perceived overreaches and failures.<sup>471</sup> Civil servants — the career government employees both the Brownlow Committee and Landis viewed as central to effective governance — are one such internal force.<sup>472</sup> A critical characteristic of civil servants that allows them to check overreach is their protection from employment termination.<sup>473</sup> But independence protections are not the only strength of the civil service. Often professionals by training, civil servants frequently “feel bound by legal, moral, or professional norms to certain courses of action,”<sup>474</sup> with their concern for legal authority forming “an often unappreciated bulwark to the rule of law” within agencies.<sup>475</sup> Executive branch lawyers are a particularly important group when it comes to legal accountability. Lawyers operate throughout the national administrative state, in centralized legal offices at the White House and Department of Justice, in agency general counsel offices, and even on

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<sup>469</sup> *Id.* at 1896–97; see Bressman, *supra* note 442, at 529–33 (describing arguments by prominent administrative law scholars contending that “the problem of arbitrary administrative decisionmaking [is] the lack of standards controlling the exercise of administrative authority”); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121–22 (2011) (arguing for a “due process model” under which delegations to agencies must be constrained and structured so as not to “increas[e] the government’s capacity for arbitrariness”).

<sup>470</sup> See, e.g., LANDIS, *supra* note 436, at 60–62, 98–100, 103–06; see also William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 61, 67–79 (arguing against a top-down conception of accountability).

<sup>471</sup> Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 234–42 (2016).

<sup>472</sup> *Id.* at 237–39; see also Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2331–35 (2006).

<sup>473</sup> Michaels, *supra* note 471, at 237–39.

<sup>474</sup> LEWIS, *supra* note 443, at 30.

<sup>475</sup> HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 408 (2006); see also Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 445 (2009) [hereinafter Metzger, *Internal and External Separation of Powers*].

the ground with agency personnel.<sup>476</sup> Few agency policies and sanctioned actions go unvetted by lawyers, and agency lawyers often wield substantial power — arguably, too much power — over agency policy.<sup>477</sup> More broadly, the substantive expertise of agency personnel, as well as their access to information and commitment to their agencies' missions, can offer a potent check on perceived political abuse of administrative power.<sup>478</sup> These internal forces are often externally supported. Professional networks, for example, help to reinforce procedural and reputational norms among administrators.<sup>479</sup>

Agencies' structures reveal further internal divisions and checks on administrative decisionmaking. Internal separation of functions and ALJ independence protections guard against biased decisionmaking by keeping agency prosecutors and adjudicators apart.<sup>480</sup> Independent internal agency watchdogs such as inspectors general investigate alleged agency malfeasance, and agencies often have separate offices dedicated to advocating for civil rights in agency decisionmaking.<sup>481</sup> Even different agencies can check one another, with statutory schemes frequently imposing requirements of interagency consultation or building in redundancy to prevent regulatory gaps.<sup>482</sup> State and local governments also

<sup>476</sup> See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 28, 93–94, 136–37 (2012) (describing the role of CIA and military lawyers within the executive branch); David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21–22, 41–45 (2012) (outlining the influence of civil service lawyers outside of the Office of Legal Counsel in the DOJ and the White House Counsel's Office); Pildes, *supra* note 453, at 1395–402, 1414–15 (discussing executive branch lawyers and presidential decisionmaking).

<sup>477</sup> See, e.g., MASHAW & HARFST, *supra* note 193, at 172–201 (describing how National Highway Safety Administration lawyers' concerns over litigation fundamentally reoriented the agency's regulatory strategy).

<sup>478</sup> See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 544–45 (2015). See generally Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097 (2015) (analyzing varieties of administrative expertise).

<sup>479</sup> DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 23–30 (2001); see also Michaels, *supra* note 471, at 237–39 (describing the impact of professional norms on civil servants).

<sup>480</sup> Barnett, *supra* note 98, at 803–09.

<sup>481</sup> See, e.g., GOLDSMITH, *supra* note 476, at 95–108 (describing the position of CIA Inspector General); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014) (describing the work of civil rights offices within agencies, focusing on the office at the Department of Homeland Security); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 316–24 (2015) (discussing the executive branch's Privacy and Civil Liberties Oversight Board); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1036–39, 1074–78 (2013) (describing and evaluating national security inspectors general's increased role in individual rights protection).

<sup>482</sup> See Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 13), <https://ssrn.com/abstract=2841253> [<https://perma.cc/Q3VA-G874>] (describing four different forms of agency monitoring and interaction: hard hierarchy, soft hierarchy, advisory or monitoring authority, and symmetrical).

can be powerful forces pushing for changes in national administrative governance.<sup>483</sup> Although not internal to national administration in the same manner as agency decisionmaking structures or civil servants, states and localities are often responsible for central aspects of federal regulation and federal program implementation.<sup>484</sup>

Like bureaucratic accountability, these internal constraints also carry constitutional significance. To begin with, they support traditional external checks on the executive branch and thus empower the Constitution's separation of powers system. Congress and the courts depend upon agency personnel for the information and expertise they need to perform their external review roles. This relationship is often reciprocal, with Congress and the courts playing central roles in reinforcing internal executive branch constraints.<sup>485</sup> Agency staff have relationships with congressional overseers and reports of executive branch misdeeds can trigger congressional investigation.<sup>486</sup> Courts can also reinforce internal checks, for example by signaling that decisions made over career staff objections — or without internal administrative consultation and review — may trigger heightened judicial scrutiny.<sup>487</sup> These internal mechanisms also play a constitutional role in preventing individual rights violations, such as biased decisionmaking. Indeed, recent historical scholarship has documented a wide array of instances in which agency professionals and civil rights offices sought to develop rights protections beyond those available in court.<sup>488</sup> In the early decades of the

<sup>483</sup> See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 976–82 (2016) (describing how national programmatic dependence on states has allowed state governors to force Presidents to compromise on Medicaid expansion and marijuana policy).

<sup>484</sup> Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 470 (2012).

<sup>485</sup> Metzger, *Internal and External Separation of Powers*, *supra* note 475, at 442–47; see also Michaels, *supra* note 471, at 244–60 (discussing how Congress and the courts can rely on different forces active in the administrative sphere to compete with the President for bureaucratic control).

<sup>486</sup> See JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 5–7, 95–96 (1990) (describing communication between congressional and agency staff); see also Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 952 (2014) (detailing the Government Accountability Office's (GAO) investigation, at the request of members of Congress, into the FDA's refusal to grant the morning-after pill over-the-counter status and the GAO's access to internal information and staff views).

<sup>487</sup> See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1165–66 (9th Cir. 2017) (per curiam) (emphasizing lack of usual intra-executive branch review in closely scrutinizing President's Trump first travel ban); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 694 (2009) (noting that the Supreme Court reversed itself and granted certiorari in *Boumediene v. Bush*, 553 U.S. 723 (2008), after “high-ranking personnel disclosed numerous administrative mistakes in the implementation of the rules governing [Combatant Status Review] tribunals”); Metzger, *Internal and External Separation of Powers*, *supra* note 475, at 444–46.

<sup>488</sup> See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES 73 (2010) (describing the EEOC's interpretation of sex discrimination to include pregnancy discrimination); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the*

twentieth century, for example, “[p]rogressive lawyers within the executive branch took the lead in forging a new civil-libertarian consensus” in accommodating the civil liberties of conscientious objectors.<sup>489</sup>

In addition to empowering and enforcing external checks on executive power, internal administrative constraints perform a constitutional function by embedding separation of powers values into the fabric of administrative government.<sup>490</sup> Just as the constitutional separation of powers system diffuses power among the branches to prevent its accumulation in any single branch, internal constraints diffuse power within the executive branch to forestall presidential aggrandizement.<sup>491</sup> In this fashion, internal constraints also help ensure that governmental power is wielded in an articulated manner, guarding against the combination of distinct governance functions in the same administrative hands.<sup>492</sup> Similarly, just as requirements of bicameralism and presentment are defended as fostering deliberation before legislation is enacted, internal constraints foster deliberation by bringing a range of perspectives to bear in setting executive policy.<sup>493</sup> And by ensuring a major role for career bureaucrats and professionals in government decisionmaking, these constraints foster rule-of-law values of continuity and stability.<sup>494</sup> Implicit in this view of internal constraints as serving to realize separation of powers principles is the idea that these principles have substance beyond their specific instantiations in constitutional text. Some disagree

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*Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 810–36 (2010) (describing the FCC’s efforts to expand workplace rights). A striking feature of historical scholarship on administrative constitutionalism is the extent to which it portrays individual rights as a state-building tool, rather than as a limit on government. See Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 320–23 (2012).

<sup>489</sup> Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 (2014); see also Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 338–48 (comparing enforcement of civil liberties at the NLRB and the DOJ during the 1930s).

<sup>490</sup> For an account of the need “to adapt the framers’ checks and balances principles” to the realities of contemporary governance, in particular presidential lawmaking, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994).

<sup>491</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“[T]he separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch . . .”); Flaherty, *supra* note 268, at 1810 (describing “balance, accountability, and energy” as core separation of powers values); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651–52 (2001) (explaining importance of fragmented power to separation of powers).

<sup>492</sup> WALDRON, *supra* note 260, at 46–51, 62–70.

<sup>493</sup> See *INS v. Chadha*, 462 U.S. 919, 948–49 (1983); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

<sup>494</sup> Huq & Michaels, *supra* note 262, at 387–88.

with that proposition.<sup>495</sup> It remains, however, a basic aspect of the Court's jurisprudence on constitutional structure.<sup>496</sup>

No doubt, the suggestion that constraints limiting the President's power over the executive branch serve a constitutional function is anathema to those who believe that the Constitution grants the President full and immediate control over all aspects of executive branch decisionmaking and personnel.<sup>497</sup> That is a minority position, however — one that even the Roberts Court appeared to reject by upholding a regulatory scheme with one level of for-cause protection.<sup>498</sup> In addition, many of the internal administrative checks described above do not represent direct or formal constraints on presidential power, such as statutory independence requirements. Instead, they work indirectly and informally, for example by creating agency cultures and decisionmaking norms that have a checking effect in practice.<sup>499</sup> And internal checks can also operate to empower Presidents, to the extent they harness greater competency and expertise in the pursuit of presidential goals. Presidents may well support independence provisions for this reason.<sup>500</sup>

In short, the administrative state is awash with internal accountability mechanisms, and executive power is far more internally constrained than anti-administrativists admit. Of course, these mechanisms do not always succeed in guarding against administrative abuse of authority, and sometimes have the opposite effect. Internal administrative law can be used to advance aggressive views of an agency's authority, for instance, and there are prominent examples of executive branch lawyers sanctioning unlawful conduct.<sup>501</sup> The very variety and multiplicity of

<sup>495</sup> Dean John Manning has forcefully argued that “the Constitution adopts no freestanding principle of separation of powers.” John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) [hereinafter Manning, *Ordinary Interpretation*] (emphasis omitted); see also Manning, *supra* note 421, at 30–48 (critiquing the Rehnquist and Roberts Courts' use of freestanding separation of powers and federalism principles to limit the necessary and proper power).

<sup>496</sup> See Manning, *Ordinary Interpretation*, *supra* note 495, at 1942–44. I have defended reliance on such freestanding constitutional concerns elsewhere. Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98 (2009).

<sup>497</sup> See CALABRESI & YOO, *supra* note 65, at 420–25 (arguing that almost all Presidents have exercised the power to direct subordinates and that perceived limits on presidential power over the civil service and independent agencies are historically novel); Calabresi & Prakash, *supra* note 445, at 581–84 (arguing that independent agencies violate the Executive Power and Take Care Clauses).

<sup>498</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–10 (2010).

<sup>499</sup> See *supra* notes 470–79 and accompanying text.

<sup>500</sup> See GOLDSMITH, *supra* note 476, at xv–xvi; POSNER & VERMEULE, *supra* note 453, at 137–50 (arguing that Presidents often have incentives to adopt self-binding mechanisms).

<sup>501</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (arguing that deferring to agency interpretations of their own regulations leads to aggrandizement); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1718–19 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (discussing historical examples of executive branch lawyers “upholding presidential actions of, at best, highly questionable legality”).

these mechanisms make claims of the beneficial impact of any particular mechanism hard to verify; lack of transparency in much executive branch decisionmaking further occludes clarity about how these mechanisms function and how much traction they have in practice.<sup>502</sup> That administrative accountability mechanisms fail at times, however, does not mean they are fundamentally ineffective. The many examples of their positive impact, at both the agency and presidential level, preclude such a conclusion.<sup>503</sup> At a minimum, whatever doubts exist about the impact of these measures, their existence alone demonstrates the inaccuracy of anti-administrative portrayals of the administrative state as simply power-aggrandizing and unaccountable.

2. *Effective Governance.* — The administrative state does more than oversee and constrain. It also empowers and provides the means for effective governance. As eloquently propounded by Landis, the administrative state brings expertise, specialization, and information to bear on complicated policy and regulatory challenges, and does so in a way that allows for public participation and proactive government action. In particular, Landis emphasized that the combination of legislative, adjudicatory, and executive functions in agencies is essential for effective regulation.<sup>504</sup> Similar consequentialist arguments remain at the forefront of contemporary defenses of the administrative state.<sup>505</sup> This is not to say that administrative government always or necessarily regulates well; regulatory failures and phenomena like agency capture make any such claim implausible.<sup>506</sup> The point is instead a comparative one. Neither legislatures nor courts have the kind of expertise and institutional capacity that agencies do, or the ability to adapt policy at the pace demanded by contemporary society, across the vast range of contexts in which administrative government is active.<sup>507</sup>

Effective governance is another important dimension of accountability in executive power. Although anti-administrativists focus on the danger of too-active government, an executive branch that fails to effectively perform the responsibilities Congress has assigned to it should be

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<sup>502</sup> See generally Levinson, *supra* note 264, at 43–82 (discussing the difficulty of assessing who wields power in different institutional arrangements).

<sup>503</sup> For a contrary view, see D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 77–92 (2017).

<sup>504</sup> LANDIS, *supra* note 436, at 1–5, 10.

<sup>505</sup> See, e.g., STEINZOR & SHAPIRO, *supra* note 281; VERMEULE, *supra* note 147.

<sup>506</sup> For recent accounts that identify these regulatory deficiencies, and caution against too quickly assuming they are present, see REGULATORY BREAKDOWN (Cary Coglianese ed., 2012); and PREVENTING REGULATORY CAPTURE 2–12 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>507</sup> LANDIS, *supra* note 436, at 20, 30, 48–49; Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–11 (2016).

equally troubling. The Brownlow Committee captured this point in insisting that democracy necessitates strong government.<sup>508</sup> The Committee also argued that bureaucratic oversight was the key to achieving effective governance, indicating how the different varieties of administrative state accountability are often mutually supporting.<sup>509</sup> But they can also work at cross-purposes. In particular, internal administrative checks and constraints can render energetic and effective government harder to achieve. Now Justice Elena Kagan has warned of “inertia and torpor” as “inherent vices” of bureaucracy that are obscured by incessant focus on the potential for agency abuse of power.<sup>510</sup> Her defense of presidential administration was premised in part on the importance of presidential direction to ensuring achievement of coherent objectives in an expeditious, cost-effective, and rationally prioritized way.<sup>511</sup> Other scholars disagree, emphasizing the importance of agency expertise, independent deliberation, and intra-executive branch conflict for better results and even better implementation of presidential policies.<sup>512</sup> Still others contend that efficacy measures such as strong presidential control achieve their results at too great a risk of excessive and unchecked executive power.<sup>513</sup> But underlying this debate is shared agreement on the value of effective government, regardless of how that value is balanced against conflicting concerns with preventing abuse of power.

Making government effective is one of the administrative state’s most important constitutional functions.<sup>514</sup> Some anti-administrativists reject such a claim; they insist that governmental effectiveness is constitutionally irrelevant and even celebrate inefficiency as a constitutional virtue.<sup>515</sup> In this regard, they enjoy the support of some prior Supreme Court decisions, such as *INS v. Chadha*’s famous insistence that “the

<sup>508</sup> See BROWNLOW REPORT, *supra* note 423, at 3.

<sup>509</sup> See *id.* at 46–47.

<sup>510</sup> Kagan, *supra* note 191, at 2263; see also Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 676–78 (2015) (“In the administrative state, abuse of power is not something to be minimized, but rather optimized.”).

<sup>511</sup> Kagan, *supra* note 191, at 2339–46; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93–106 (1994).

<sup>512</sup> See Farber & O’Connell, *supra* note 482 (manuscript at 54–57); Mark Seidenfeld, Foreword, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1425–26 (2013); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 101 (2000); see also LEWIS, *supra* note 443, at 172–201 (presenting data on improved agency performance with limited politicization).

<sup>513</sup> SHANE, *supra* note 192, at 4–13.

<sup>514</sup> See N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (forthcoming 2018) (manuscript at 1–36) (on file with the Harvard Law School Library).

<sup>515</sup> See, e.g., *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting) (“But the difficulty of making new laws isn’t some bug in the constitutional design: it’s the point of the design, the better to preserve liberty.”); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (arguing that “bicameralism and presentment make lawmaking difficult by design” (alteration omitted) (quoting Manning, *supra* note 255, at 202)).

fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>516</sup> But even though efficacy cannot justify a constitutional violation, it is not precluded from carrying constitutional significance in the absence of such a violation, nor is efficacy excluded from influencing assessments of whether a measure is unconstitutional in the first place. The Court has made this point as well, stating that “[t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. . . . [And it] ‘has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.’”<sup>517</sup> Moreover, the Court has refused to impose requirements that would “stultify the administrative process” or make that process “inflexible and incapable of dealing with many of the . . . problems which arise.”<sup>518</sup> Perhaps most relevant for anti-administrativists, achieving effective governance — “the promotion of energetic and responsible governance in the common interest” — was an express and central concern of the Framers in designing the national government.<sup>519</sup> Denying governmental efficacy constitutional significance is thus impossible to square with the constitutional separation of powers system.

### C. *The Administrative State as Constitutionally Obligatory*

Far from representing a constitutional threat, the administrative state thus plays a critical role in both cabining and effectuating executive power. Returning to the 1930s debates helps identify important constitutional functions that the administrative state performs. But the point can be taken even further: The modern national administrative state is now constitutionally obligatory, rendered necessary by the reality of delegation.

1. *Delegation and Its Implications.* — Congressional delegations of authority to the executive branch date back to the nation’s earliest days of existence, and have been upheld by courts for nearly as long.<sup>520</sup> The

<sup>516</sup> 462 U.S. 919, 944 (1983).

<sup>517</sup> *Yakus v. United States*, 321 U.S. 414, 424–25 (1944) (second omission in original) (quoting *Curran v. Wallace*, 306 U.S. 1, 15 (1939)).

<sup>518</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

<sup>519</sup> Pozen, *supra* note 86, at 75; *see supra* p. 45. Effective governance was also a central concern of leading separation of powers theorists such as Locke, who defended separating out executive power in efficiency terms. *See BARBER, supra* note 514 (manuscript at 4–6).

<sup>520</sup> *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) (“[T]here was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power.”). *But see Ass’n of Am. R.Rs.*, 135 S. Ct. at 1246–50 (Thomas, J., concurring in the judgment) (arguing that the delegations upheld before the *New Deal* were more limited).



1930s witnessed the only times that the Supreme Court has held a delegation unconstitutional, with delegation representing a central bone of contention in the constitutional battle over the New Deal.<sup>521</sup> The centrality of delegation to that battle should not be surprising. Reflecting the constitutional principle that administrative agencies can only exercise authority delegated to them,<sup>522</sup> delegation represents the foundation on which the administrative state rests. In Professor Louis Jaffe's famous words, delegation is "the dynamo of modern government."<sup>523</sup> The New Deal delegations sustained by the Court were notably open-ended, including instructions for agencies to regulate in the "public interest."<sup>524</sup> But over the ensuing eight decades the scope of delegations has expanded significantly further. Today, Congress has delegated substantial policymaking authority to the executive branch across a wide array of contexts.<sup>525</sup>

Many anti-administrativists maintain that the Court's multiple decisions sustaining broad delegations represent a fundamental deviation from the Constitution's separation of powers structure. These critiques rest on contested views about the meaning of "legislative" and "executive" power — contested even among anti-administrativists themselves.<sup>526</sup> An additional reason for skepticism is the difficulty anti-administrativists face in constructing a plausible test for constitutionally permissible delegations. Justice Thomas's effort to prohibit any delegation of policymaking authority in setting general rules is practically infeasible and at odds with longstanding practice.<sup>527</sup> But more functionalist assessments, focused on determining when a delegation goes too far, are similarly unworkable. As Justice Scalia argued, once "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree," it becomes hard to conclude that courts are competent or "qualified to second-guess Congress."<sup>528</sup>

Yet whatever their views on current nondelegation doctrine, both anti-administrativists and supporters of administrative government

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<sup>521</sup> See *supra* p. 53.

<sup>522</sup> See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).

<sup>523</sup> LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 33 (1965).

<sup>524</sup> Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

<sup>525</sup> See DeMuth, *supra* note 183, at 125–26.

<sup>526</sup> See Magill, *supra* note 491, at 618–23; see also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that legislative power simply means enactment of a congressional statute). Compare Lawson, *supra* note 179, at 376–78 (suggesting that the Constitution requires Congress to make "sufficiently important" decisions), with *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1251 (2015) (Thomas, J., concurring in the judgment) (arguing that it is a mistake to assume that "any degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct").

<sup>527</sup> See generally Whittington & Iuliano, *supra* note 520.

<sup>528</sup> *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

should agree that the phenomenon of broad delegation is not at risk of judicial invalidation. Justice Thomas aside, little support exists on the Court for invalidating delegations to the executive branch on constitutional grounds.<sup>529</sup> More support exists for a variety of moves seen as curtailing the scope of delegated power, such as interpreting delegations narrowly or rejecting deference to agency determinations of the scope of their delegated authority.<sup>530</sup> All of these moves, however, accept the basic phenomenon of broad delegation and seek to tame its perceived capacity for abuse. The relevant constitutional question then becomes what the separation of powers requires in a world of substantial delegation of policymaking authority to the executive branch. It is in this context that the administrative state is constitutionally obligatory.

Put differently, the modern national administrative state is the constitutionally mandated consequence of delegation.<sup>531</sup> To see why, begin with the Constitution's requirement that the President shall "take Care that the Laws be faithfully executed."<sup>532</sup> It follows that the administrative capacity the President needs in order to satisfy the take care duty is also required. So far, few would disagree.<sup>533</sup> What does that administrative capacity entail in the context of broad delegations? For starters, it means sufficient bureaucratic apparatus and supervisory mechanisms to adequately oversee execution of these delegated powers. It also requires sufficient administrative resources and personnel, in particular adequate executive branch expertise and specialization, to be able to faithfully execute these delegated responsibilities in contexts of tremendous uncertainty and complexity.<sup>534</sup> Arguably, this means that professional and expert government employees are now constitutionally

<sup>529</sup> See *supra* notes 118–19 and accompanying text. Justice Gorsuch has indicated some sympathy with Justice Thomas's view. See *supra* note 120.

<sup>530</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting) (arguing it is the role of the courts to determine whether agency has been delegated jurisdiction); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

<sup>531</sup> Cf. Greene, *supra* note 490, at 124 ("[I]f we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers' principles . . . we must also accept some (though not all) congressional efforts at regulating presidential lawmaking."); Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 362–63 (2017) (arguing for accepting the reality of delegation and analyzing what administrative structures would follow under formalist constitutionalist principles).

<sup>532</sup> U.S. CONST. art. II, § 3.

<sup>533</sup> See *supra* notes 465–69 and accompanying text (discussing the constitutional benefits of bureaucratic accountability). Compare *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." (quoting U.S. CONST. art. II, § 3)), with Strauss, *supra* note 55, at 704–05 ("[W]here Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role — like that of the Congress and the courts — is that of overseer and not decider.").

<sup>534</sup> Cf. VERMEULE, *supra* note 147, at 126–54 (describing the "pervasive presence of uncertainty in the administrative state," *id.* at 153).

required as well, and perhaps also the civil service, insofar as such career staff are necessary to ensure expertise and institutional stability in agencies.<sup>535</sup>

Simply from the proposition that delegated power must be faithfully executed, then, the outlines of a constitutionally mandated administrative state begin to emerge. Moreover, from this proposition some proposed anti-administrative measures, such as massively underfunding the EPA without altering its statutory responsibilities or repealing environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime,<sup>536</sup> begin to look constitutionally suspect.

Admittedly, the claim that the Constitution necessitates some level of administrative resources, personnel, and activity seems to impute more of a positive rights aspect to our generally negative rights constitutional order. An alternative view might insist that all the Constitution requires is that the President ensure the laws are executed as faithfully as possible given the resources Congress has provided, and that the Constitution grants Congress discretion over whether and how much to fund.<sup>537</sup> Yet such a view ignores the extent to which, combined with delegation, the take care duty and broader duty to supervise do carry an affirmative dimension. Delegation comes with constitutional strings attached. Having chosen to delegate broad responsibilities to the executive branch, Congress has a duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions.<sup>538</sup> To be clear, such a duty is unlikely to be judicially enforceable. Judicially manageable standards for determining what counts as adequate supervision, staffing, and resources to fulfill delegated responsibilities will often be lacking, and a severe risk exists that courts would intrude on the constitutional responsibilities of the other branches were they to seek to play an enforcement role.<sup>539</sup> Yet that the duty is dependent on the political branches for its realization does not affect its constitutional basis.

The constitutional consequences of delegation can be pushed further, to include a requirement of some internal administrative constraints of

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<sup>535</sup> See BROWNLOW REPORT, *supra* note 423, at 7 (arguing that modern government “requires personnel of the highest order”); Michaels, *supra* note 471, at 237–39.

<sup>536</sup> Juliet Eilperin & Brady Dennis, *White House Eyes Plan to Cut EPA Staff by One-Fifth, Eliminating Key Programs*, WASH. POST (Mar. 1, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/white-house-proposes-cutting-epa-staff-by-one-fifth-eliminating-key-programs/> [<https://perma.cc/5VG2-KV6W>].

<sup>537</sup> Cf. U.S. CONST. art. I, §§ 7–8 (discussing Congress’s powers to raise revenues and make appropriations).

<sup>538</sup> See Metzger, *The Constitutional Duty to Supervise*, *supra* note 260, at 1886–97.

<sup>539</sup> See *id.* at 1906–07.

the kind described above.<sup>540</sup> Such a requirement would rest on the danger that broad delegations to the executive branch may create an imbalance of power among the branches and breed presidential unilateralism. Moreover, external checks by Congress and the courts may be limited in practice.<sup>541</sup> Thus, arguably, an additional constitutional string on delegations to the executive branch is that such delegations must be structured so as to limit the potential for aggrandizement and preserve checks and balances on governmental power.<sup>542</sup> But even if delegation necessitates some internal constraint, it is harder (but not impossible)<sup>543</sup> to claim that a specific checking measure is required. Moreover, even deriving a general requirement of internal constraint is debatable, given the constitutional value also attached to effective governance and to presidential oversight and supervisory control over the executive branch. Hence, the fact that internal constraints play an important constitutional function in implementing the separation of powers is not enough, on its own, to conclude that such structural measures are constitutionally mandated.

Finally, what about delegation itself: should any delegations of authority to the executive branch that typify contemporary government be considered constitutionally mandated? The idea that delegation mandates delegation has an obvious and troubling circularity. It also risks undercutting a critical formal link to democratic choices that justifies imposing conditions from delegation. If Congress lacks power to rescind delegations, and if delegations come with substantial administrative requirements attached, then decisions about the shape of government are no longer subject to popular control. In the end, however, the most important point is that the phenomenon of delegation represents such a fundamental and necessary feature of contemporary government that it is mandatory in practice. And from delegation key features of the administrative state follow.

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<sup>540</sup> See *supra* notes 474–88 and accompanying text.

<sup>541</sup> See Metzger & Stack, *supra* note 459, at 1263–64 (describing limitations of external constraints on agencies); see also Wurman, *supra* note 531, at 385–89 (arguing that allowing the legislative veto would significantly enhance Congress’s capacity to check the executive branch and should be held constitutional as a result of delegation).

<sup>542</sup> See Farina, *supra* note 194, at 487, 497–98 (“The issue posed by the delegation of regulatory authority has come to be viewed purely in terms of whether the new allocation of power can be adequately checked . . . .” *Id.* at 487.); Greene, *supra* note 490, at 125–26 (“[M]uch of the Court’s post–New Deal checks and balances jurisprudence can be justified as an attempt to ensure fidelity to the original understanding of checks and balances in a post–nondelegation doctrine world.”); Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 1004 (2007) (arguing that *Cheney*’s contemporaneous statement requirement serves to cabin delegated power). The requirement of some internal executive branch division also follows from the prohibition on “omnipotent” and “omnipowered” delegations that Professor Todd Rakoff identifies as the *A.L.A. Schechter* principle. Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 21–24 (1992).

<sup>543</sup> See *supra* notes 534–35 and accompanying text (arguing that professional staff and the civil service may be required today).

2. *Delegation and Current Anti-Administrative Challenges.* — Recognizing the implications of delegation has particular relevance for current constitutional attacks on the administrative state. Many of the features of the administrative state that anti-administrativists condemn — the combination of legislative, executive, and judicial powers; administrative adjudication of private rights; and judicial deference to administrative statutory interpretations — arguably follow simply from the phenomenon of delegation.

Take first the combination of powers: Adequately supervising executive branch personnel to ensure they faithfully execute their delegated responsibilities means agency officials must specify what those responsibilities are for agency staff — and the broader the delegation, the more specification is required. This entails interpreting statutes delegating authority to determine what they require and allow, as well as developing and adopting policy that conforms to those delegations. Moreover, faithfully executing delegated authority also entails applying these policies and requirements to specific actions and contexts within their ambit. Such actions of interpretation and application can be viewed as simply different dimensions of executing the law, or as combined exercises of legislative, adjudicatory, and executive powers.<sup>544</sup> The broader the delegation, as Chief Justice Roberts suggested, the more the latter appears descriptively accurate.<sup>545</sup> Either way, the important point is that these actions become constitutionally necessary activities for executive branch officials to perform as a result of delegation. Furthermore, the constitutional imperatives to ensure that delegated authority is faithfully executed and to supervise delegated power entail that high-level agency officials be able to review applications of that authority by lower-level agency staff. Or in other words, these legislative, judicial, and executive functions must be combined not just in executive branch agencies, but more particularly in the heads of departments charged with overseeing their respective department's activities.

Full-blown administrative adjudication follows less obviously from delegation. It seems a stretch to claim that faithfully executing delegated authority requires agencies to do so through a trial-type proceeding. Certainly, if Congress has required an agency to implement its delegated authority through rulemaking, it would be implausible to claim that an agency must nonetheless engage in administrative adjudication to faithfully execute its delegated powers. Similarly, if Congress has prohibited or even not authorized an agency to issue binding rules, then the power

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<sup>544</sup> See Magill, *supra* note 491, at 608–26; see also *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) (“Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of . . . the ‘executive Power.’” (quoting U.S. CONST. art. II, § 1, cl. 1)).

<sup>545</sup> *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

to do so cannot be inferred from delegation.<sup>546</sup> On the other hand, the constitutional requirement to ensure that delegated authority is faithfully executed does entail action applying that authority. That means agency staff will need to engage in actions that qualify as adjudication in the constitutional sense — applying general rules to specific cases.<sup>547</sup> And insofar as an agency is therefore depriving an individual of property or liberty in a manner that would trigger due process, it may be required to provide notice and an opportunity to be heard before acting.<sup>548</sup> Hence, some form of administrative adjudication may follow as a constitutionally necessary consequence of delegation.

This leaves the question of judicial deference, increasingly the flashpoint for anti-administrativist attacks.<sup>549</sup> Although some anti-administrativists maintain that judicial deference is prohibited by Article III, giving due weight to delegation complicates such a claim. As Professor Henry Monaghan elaborated before *Chevron* was decided, judicial deference can be viewed as simply an acknowledgement of the scope of authority delegated to the executive branch.<sup>550</sup> Unless such delegations are unconstitutional, the constitutional separation of powers system requires that the courts honor congressional policy choices. And honoring congressional choices to delegate means deferring to agency judgments within the sphere of the agency's constitutionally delegated authority.<sup>551</sup>

This delegation argument for deference is contingent on a determination that Congress has delegated authority over the question at issue.<sup>552</sup> That is a question subject to robust debate. Scholars have long criticized *Chevron*'s presumption that when Congress delegates agency authority to implement a statute it intends to delegate authority to fill

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<sup>546</sup> Current doctrine requires Congress to authorize rulemaking for an agency to have power to do so, although grants of rulemaking authority are read broadly. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (“We have said that a rule has [the] force [of law] only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.”); see also Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472, 544–70 (2002) (describing the current practice of reading rulemaking grants broadly and arguing this approach is historically mistaken).

<sup>547</sup> See *Londoner v. City & County of Denver*, 210 U.S. 373, 385–86 (1908).

<sup>548</sup> See *id.*

<sup>549</sup> See *supra* section I.B.2, pp. 24–28.

<sup>550</sup> Monaghan, *supra* note 235, at 26 (“Judicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency.” (emphasis omitted)).

<sup>551</sup> See, e.g., Strauss, *supra* note 244, at 1145 (discussing “*Chevron* space”).

<sup>552</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”).

gaps and ambiguities in the statute, arguing that the presumption is empirically unsound, at odds with the APA's text, and in tension with institutional incentives. Others have countered that the presumption has greater empirical, textual, and institutional support than generally allowed, particularly given that the question is not whether Congress has delegated but whether it has chosen an agency or a court as its delegate.<sup>553</sup> To some extent, the answer to this question turns on the level at which it is asked — congressional intent to delegate authority on a specific issue is much harder to presume, but congressional intent to give an agency broad authority to implement a statutory regime is easier to identify.<sup>554</sup> Regardless, this debate does not undercut the constitutional point that *if* Congress has delegated such authority, then a necessary consequence of acknowledging Congress's power to delegate is that courts should defer to agencies' exercise of their delegated authority — and Chief Justice Roberts has acknowledged as much.<sup>555</sup> Hence, a strong case can be made that accepting delegation does beget deference, leaving open the question of how much evidence of delegation should be required.

Moreover, the strongest separation of powers responses to this delegation argument for deference also sound in delegation terms. Professor Cynthia Farina's critique of *Chevron*, for example, contends that the *Chevron* doctrine misunderstands the basis on which broad congressional delegations to the executive branch are constitutional: "If Congress chooses to delegate regulatory authority to agencies, part of the price of delegation may be that the court, not the agency, must hold the power to say what the statute means."<sup>556</sup> This view that the constitutional "price" of delegation is independent judicial judgment is debatable. It is at odds not only with Monaghan's account but also that offered by Chief Justice Roberts in *City of Arlington*, under which the "price" of delegation is determining whether Congress has delegated jurisdiction over the issue in question, with *Chevron* deference acceptable if so.<sup>557</sup> Perhaps most interestingly, however, Farina offers this argument not as

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<sup>553</sup> See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–38 (2006) (listing reasons Congress delegates, including why Congress might delegate to agencies over courts). Compare Beermann, *supra* note 194, at 788–94, 829 (critiquing *Chevron* as empirically unsound and at odds with the APA), with Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–1006 (2013) (presenting empirical evidence that both supports and undermines *Chevron*'s presumption).

<sup>554</sup> See *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (arguing that delegation should be assessed at a general level).

<sup>555</sup> *Id.* at 316 (Roberts, C.J., dissenting).

<sup>556</sup> Farina, *supra* note 194, at 498.

<sup>557</sup> See *City of Arlington*, 569 U.S. at 317 (Roberts, C.J., dissenting) ("Whether Congress has conferred such power is the 'relevant question[] of law' that must be answered before affording *Chevron* deference." (alteration in original) (quoting 5 U.S.C. § 706 (2012))); Monaghan, *supra* note 235.

an attack on administrative government as unconstitutional, but instead much on the terms sketched here: accepting delegation and assessing what constitutional requirements follow.

### CONCLUSION

The 1930s are long past, but eerily salient today in the face of widespread attacks on the national administrative state. Encompassing measures from budgetary and regulatory rollbacks to broad new legislative constraints on rulemaking to legal challenges questioning the fundamental constitutionality of administrative government, these attacks harken back to battles over administrative governance that took place during the New Deal. As was true in that era, contemporary anti-administrativism is inseparably political and constitutional, rooted in conservative antistatist constitutional commitments and opposition to strong regulatory government. Yet to the extent anti-administrativism rests on fears of unconstrained and consolidated power, the administrative state is the solution and not the problem. Against a background of broad delegations to the executive branch and rising presidential unilateralism, the administrative state performs essential constitutional functions in supervising, constraining, and effectuating executive power. Even further, in the world of broad delegations in which we live, core features of the administrative state are now constitutionally required. Few anti-administrativists are willing to seriously challenge delegation, and judicial anti-administrativism in particular has a notably rhetorical air, seemingly unwilling to follow through on the radical implications of its constitutional complaints.

It is time to move past the constitutional anti-administrativism of the 1930s. That constitutional vision failed to persuade in its own time and is now deeply out of step with the realities of national government. Repeatedly voicing its claims threatens the administrative state's legitimacy for little practical gain and risks further politicizing the Court. Doing so also precludes developing accounts of the separation of powers that accept and build on the administrative state's essential role in our constitutional order. Particularly in the face of the current siege of the administrative state, there is a pressing need for engagement on questions too long excluded from our reigning constitutional discourse, such as the scope and nature of constitutional obligations to govern.