

# Dædalus

Journal of the American Academy of Arts & Sciences

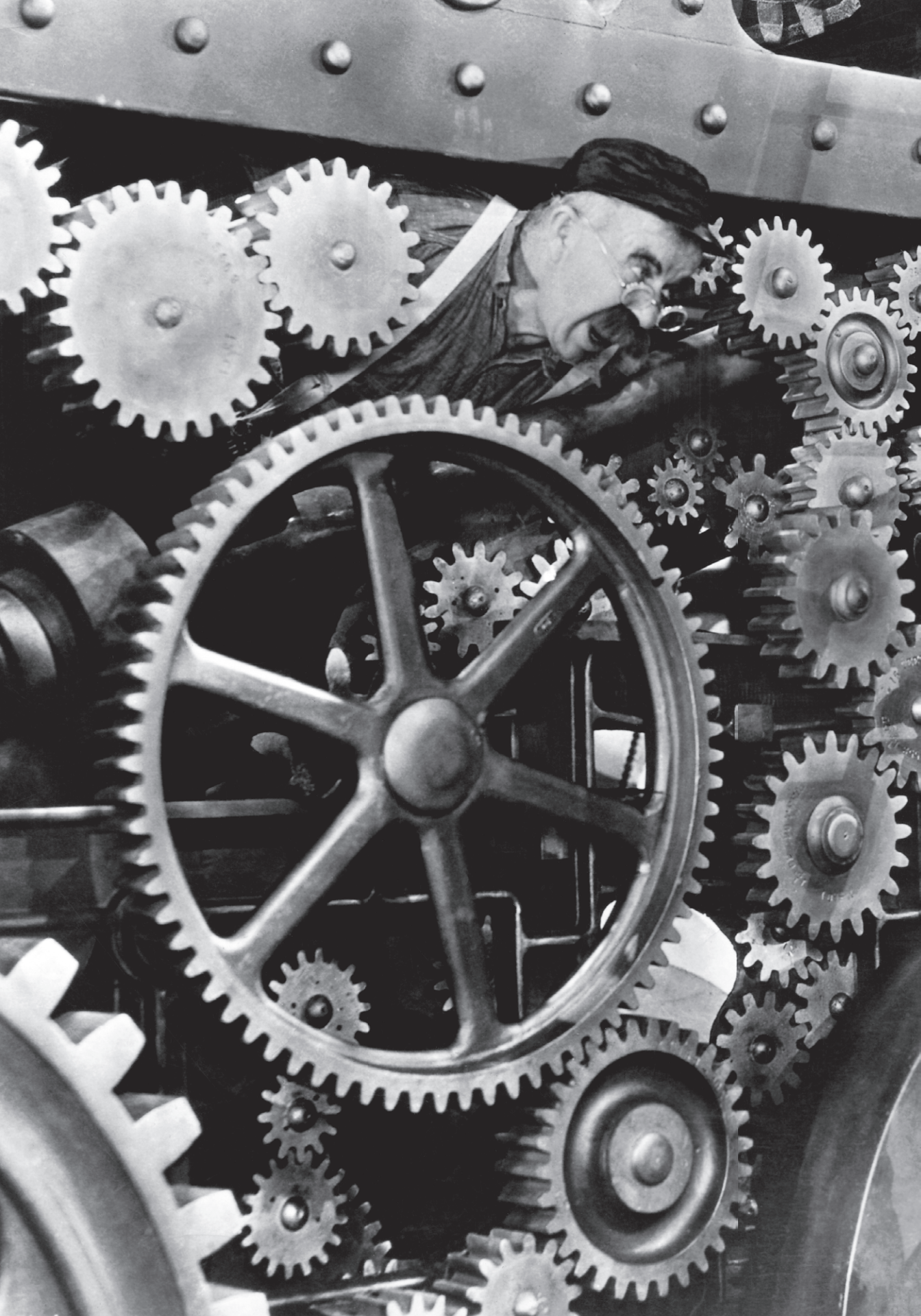
Summer 2021

## The Administrative State in the Twenty-First Century: Deconstruction and/or Reconstruction

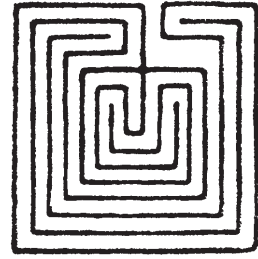


Mark Tushnet,  
guest editor

with Peter L. Strauss · Susan E. Dudley  
Sean Farhang · David E. Lewis  
Bernard W. Bell · Cary Coglianese  
Beth Simone Noveck · Aaron L. Nielson  
Christopher J. Walker · Avery White  
Michael Neblo · Jeremy Kessler  
Charles Sabel · Cass R. Sunstein · Neomi Rao



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“The Administrative State in the Twenty-First Century:  
Deconstruction and/or Reconstruction”

Volume 150, Number 3; Summer 2021

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*Inside front and back covers*: Charlie Chaplin and Chester Conklin struggle to repair the giant machinery of an idle factory in the 1936 silent film *Modern Times*. Film distributed by the United Artists Corporation; image held by the Bettman Archive, courtesy of Getty Images.

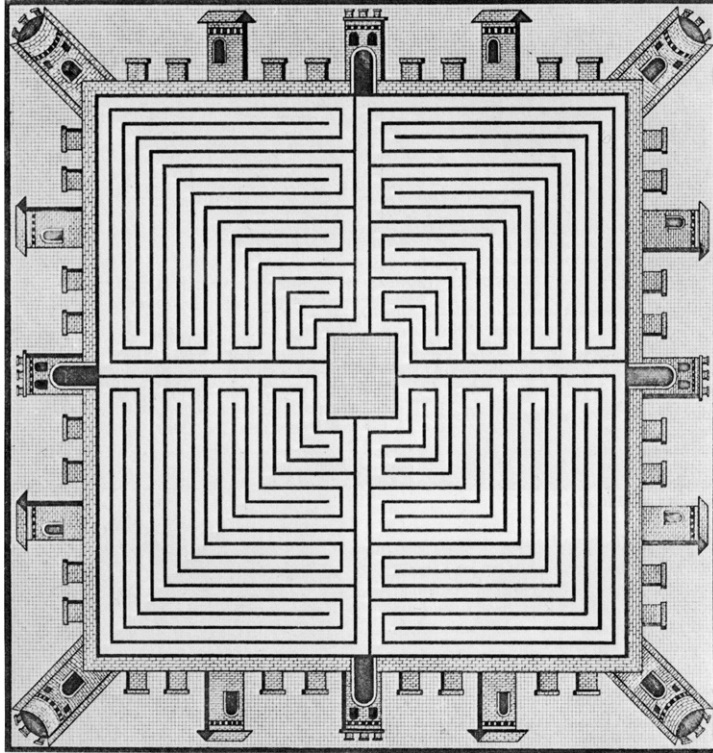
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Nineteenth-century depiction of a Roman mosaic labyrinth, now lost, found in Villa di Diomede, Pompeii

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# Introduction: The Pasts & Futures of the Administrative State

*Mark Tushnet*

*To understand contemporary arguments about deconstructing and reconstructing the modern administrative state, we have to understand where that state came from, and what its futures might be. This introductory essay describes the traditional account of the modern administrative state's origins in the Progressive era and more recent revisionist accounts that give it a longer history. The competing accounts have different implications for our thinking about the administrative state's constitutional status, the former raising some questions about constitutionality, the latter alleviating such concerns. This introduction then draws upon the essays in this issue to describe three options for the future. Deconstructing the administrative state without adopting a program of across-the-board deregulation would entail more regulation by the legislature itself and would insist that Congress give clear instructions to administrative agencies. Tweaking would modify existing doctrine around the edges without making large changes. Reconstruction might involve adopting ever more flexible modes of regulation, including direct citizen participation in making and enforcing regulation.*

Presidential adviser Stephen Bannon might have simply been coining a phrase rather than outlining a program when he said that the Trump administration was interested in “deconstructing the administrative state.”<sup>1</sup> Yet by replacing the familiar term *deregulation* with the unfamiliar *deconstruction*, Bannon captured a wider discomfort with how the modern administrative state was operating. That discomfort manifested itself in many forms: concern about the “ossification” of the process of adopting important regulatory rules across many domains, for example, and recognition that new regulatory tools could be more effective than traditional methods of prescriptive (“command and control”) regulation.<sup>2</sup> This issue of *Dædalus* explores what deconstruction and its obverse reconstruction of the administrative state might be – and whether either is called for.

In their contributions to this volume, Susan Dudley and Peter Strauss lay out in some detail their accounts of the administrative state's emergence in the United States, situating the ensuing discussion of reconstruction and deconstruction.<sup>3</sup> Here I offer my highly simplified version – quite a bare sketch of those develop-

ments as I understand them. The sketch is accurate enough, I believe, to orient nonspecialists to what follows and to cause specialists only minor discomfort.

The first story was told by the scholars who created the academic field of *administrative law*: Felix Frankfurter, James Landis, and, to a lesser degree, John Dickinson. Drawing on arguments made by an earlier group of Progressives, they found the origins of the administrative state in the late nineteenth century and argued that accommodating contemporary reality to the classical vision of U.S. constitutionalism required altering the latter so that the “new fourth branch” could fit within the Constitution. The second is a revisionist story offered by contemporary historians and legal scholars who have retrieved a longer history of the administrative state, dating to the early nineteenth century. For these scholars, the modern administrative state has always fit within the Constitution.

The Progressive story takes the 1887 creation of the Interstate Commerce Commission as the symbolic dawn of the modern era. The story identified a number of social and economic developments that, according to Progressives, had weakened the ability of the traditional institutions of government to provide effective governance. Technological change, again symbolized by the railroad but encompassing what we now refer to as information technology (the telegraph and the telephone), generated new problems: exploitation of workers and farmers, for example, and new political possibilities enabled by “yellow journalism.” So did rapid urbanization and immigration; the modern city was overcrowded, rife with environmental dangers and crime.

The Progressive story asked: what institutions were best suited to dealing with these problems? Their answer had a negative side – not the existing system of legislatures, courts, and political parties – and a positive one – the new administrative agencies guided by professionals deploying the findings of contemporary science. Courts failed because they could intervene only episodically, when someone happened to bring a case before them. The cases the judges saw gave them a view of randomly selected parts of more general problems, and sometimes solving the problem at hand would perversely make things worse elsewhere. And to the extent that problems like workplace safety came to the courts’ attention, the judges lacked both the expertise and the capacity to impose appropriate solutions: they might find railroads liable when they failed to provide workers with the equipment to allow them to disconnect and reconnect railroad cars safely, but they could not prescribe that the railroads use any particular system for doing so, even when engineers knew what the best system was.

Legislatures were inadequate in part because, dominated by politicians whose primary interest lay in holding on to power rather than advancing the public good, they failed to address new problems as they appeared – or at least failed to do so rapidly enough. By the time a problem became politically salient, the Progressive story had it, too much social damage had been done. A more nimble and self-starting



body that could identify problems rapidly – and without concern for whether voters cared about it enough to pressure their representatives – was needed. Further, even when legislatures did address real problems, they lacked the expertise to come up with the right solutions. Again, agencies staffed by professional experts in specialized fields would do better.

On this account, legislatures would do best by identifying some general field of regulatory concern (such as prices for shipping goods by railroad, workplace safety, environmental degradation), creating an agency to deal with that field, and instructing the agency to develop regulations that best promoted public welfare. That latter instruction received the doctrinal label *delegation*. The Progressives argued that delegations probably had to be stated in quite general terms, such as “public convenience and necessity” or, in a modern statute, “requisite to protect the public health with an adequate margin of safety.”<sup>4</sup> Congress could legislate in more detail, and sometimes did so, but, according to the Progressive account, broad delegations of regulatory authority were both inevitable and constitutionally permissible.

The breadth of the Progressive idea of science as the guide to public policy deserves special note. To them, science provided answers not merely to technical engineering problems but to all sorts of social ills. Economists could determine a “fair” rate of return on investment, for example. Sociologists could devise programs that would address the “root causes” of urban crime. Labor relations specialists knew how to mediate disputes between employers and workers in ways that would avoid strikes.<sup>5</sup> As I suggest later, contemporary arguments about whether or how much the administrative state should distinctively “follow the science” flow in part from a similarly expansive understanding of what science can tell us.

For students of administrative law, the first important revisionist work was William Novack’s *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (1996), which illuminated a history of robust regulation at the state level well before 1887. What, though, of the national level? Writing in 1982, political scientist Stephen Skowronek described the national government in the nineteenth century as a state of “courts and parties.”<sup>6</sup> Several decades later, historian Brian Balogh wondered about the “mystery of national authority” during that same period.<sup>7</sup> More recently, though, legal scholar Jerry Mashaw found a “lost” history of the administrative state.<sup>8</sup> Mashaw described scattered but persistently recurring forms of national regulation starting in the early republic that looked almost exactly like the forms of administrative governance that the Progressives celebrated. Other legal scholars have identified broad delegations of authority from Congress to executive branch officials from that same early period.<sup>9</sup>

These stories matter today because the Progressive story has come to generate a response in the register of deconstruction.<sup>10</sup> If, as that story holds, the modern

administrative state does not fit within traditional U.S. constitutionalism, and if, as is surely true, the Constitution was not formally amended to address that state's novelty, it follows for deconstructionists that important aspects of the administrative state must be revised. For them, the Constitution demands that Congress make major policy choices that, in the Progressive story, it has (improperly) delegated to administrative agencies, and that courts rather than agencies determine the scope of regulation that Congress has authorized. The revisionist story, in contrast, suggests that the contemporary administrative state is one of many possibilities that the original Constitution enabled. A deconstructed administrative state would of course be within the wide bounds the original Constitution created, but so is the modern administrative state, and so would a reconstructed administrative state. The revisionist story, that is, shifts our attention from constitutional limits on the administrative state to the policy choices open to us today.<sup>11</sup>

**F**rankfurter, Landis, and Dickinson wrote about the administrative state in the 1930s. By then, modern administrative agencies had become part of the landscape. The New Deal produced a new group of "alphabet" agencies, the SEC (Securities and Exchange Commission) and the NLRB (National Labor Relations Board) being the most politically prominent. Conservatives assailed these agencies as unconstitutional and then, after the Supreme Court rejected their constitutional arguments, shifted attention to what came to be known as administrative law, a theretofore marginal legal category.

The attack combined several themes.<sup>12</sup> The first sounded in good-government. As each new agency was added to the system, a body of law developed about *that* agency, without any attention to how that body of law was related to the law governing other agencies. Courts applied a plethora of "standards of review" that differed in verbal formation and sometimes in practical application. Sometimes the courts gave an agency's findings great weight; at other times they found facts anew. Reformers sought a unified body of administrative law, eventually codified as the Administrative Procedure Act (APA), that would be, as the term was, "trans-substantive": that is, the same no matter what subject matter the agency dealt with.

The other theme was straightforwardly political. The new administrative agencies were out of control, dedicated to a transformation of the national economy that voters never truly endorsed. Suggestively, the initial proposals were to impose a uniform set of standards across all agencies. Then, as they proceeded through the legislative process, the proposals were pared down: the "traditional" agencies like the Interstate Commerce Commission and the Federal Trade Commission were dropped from the proposals' coverage, and aggressive judicial oversight was to attend only the actions of New Deal agencies.

President Franklin Roosevelt understood the Walter-Logan bill that reached his desk in 1941 as a challenge to the New Deal – and vetoed it. The good-govern-

ment and political forces that had produced the bill remained in place, though, and Roosevelt promised a study to develop a statute that unified administrative law without threatening the advances, as he saw them, of the New Deal. The outcome was the APA, which for more than three-quarters of a century has provided the legal foundation for the administrative state.<sup>13</sup>

Stability in the basic document, of course, does not mean that the administrative state has been static. As Dudley and Strauss show, a second proliferation of administrative agencies occurred in the 1960s and 1970s: the Equal Employment Opportunity Commission (1965), the Environmental Protection Agency (1970), and the Occupational Safety and Health Administration (1970), among others.

The politics associated with administrative law changed as well. As administrative law scholar Richard Stewart has argued, the Progressive account of the administrative state's rise, with its focus on expertise to advance the public good, ended in the 1930s just as that politics was about to change.<sup>14</sup> Rather than seeing politics as devoted to advancing the public good, scholars began to see it as the venue for interest group bargaining and administrative agencies as one of the forums for that bargaining. As such, they became targets for "capture" by the industries they regulated. Reformers developed several responses, the most important of which were expanded notions of standing to challenge agency action, which brought new players into the bargaining game, and creating agencies with economy-wide jurisdiction, which made them less susceptible to capture by any specific industry. Then, to recreate the synoptic view of problems that agencies were supposed to take, the president began to assert greater powers of supervision.<sup>15</sup>

The upshot is clear. The politics associated with administrative law came to resemble that associated with legislation: administrative agencies became bogged down in exactly the same morass that legislatures were. They became inflexible, unable to respond nimbly to new problems, and committed to established routines that had "worked" before even when they might not work well today. Neomi Rao's contribution to this volume identifies several important pathologies she associates with the contemporary politics affecting agency operation.<sup>16</sup>

Strikingly, the contemporary economic and social landscape appears to many observers quite similar to the regulatory domain that Frankfurter and Landis described as characterizing the late nineteenth century. Its most prominent feature, perhaps, is rapid technological development, for which "the Internet" and "the new social media" are shorthand. Demographic changes too are part of the landscape. Immigration changed the nation's largest cities in the late nineteenth century, and recent waves of immigration have changed smaller cities and even some rural areas. The urbanization of the late nineteenth century is paralleled by a widening rural-urban gap in the twenty-first.

And, important for our topic, contemporary forms of governance seem ill-suited to deal with today's landscape. The critiques the Progressives leveled against courts and legislatures remain on the table. Courts proved to be innovative in developing what civil procedure scholar Abram Chayes called "public law litigation" over school desegregation and prison.<sup>17</sup> More recently, courts have entered "universal" injunctions, some of which aim at restructuring national policies rather than the state and local ones with which Chayes was concerned. Universal injunctions remain quite controversial, and they have proven more effective in blocking policy than in developing it. As of today and probably for the foreseeable future, these innovations are unlikely to spread broadly enough for courts to become general regulators in response to novel challenges.

Legislatures are gridlocked, unable to address new problems with anything like the alacrity that (some think) they demand. Legislators devote attention to problems that catch the public eye rather than those with deep roots that are largely invisible until they erupt into some policy disaster. And as I have already noted, the administrative agencies that Frankfurter and Landis saw as solutions to judicial and legislative failures are themselves caught up in what legal scholar Thomas McGarity has called "blood sport politics," unable to act quickly in response to new challenges and equally unable to produce stable policy responses when they manage to act.<sup>18</sup>

And finally, the idea of disinterested scientific expertise has come under sustained assault from all sides. Some of the challenges are retrograde, as with climate change denialism, while some are purportedly sophisticated, as with post-modernist critiques of science. Some, though, have substantial merit, mostly because technocrats have in fact claimed that science provides more answers to public policy problems than is possible.

I offer what will surely be a controversial example: the public policy response to the COVID-19 pandemic. Epidemiologists and medical doctors gave us their best estimates of the risks associated with various policy options (border closings, mask mandates, temporary or prolonged curfews, and shutdowns) in light of the information available to them when they estimated the risks. Economists gave us their best estimates of the economic costs and, as Cass Sunstein emphasizes in his essay in this volume, ballpark estimates of the costs to human life and health associated with each option.<sup>19</sup> Neither epidemiologists nor economists, though, could tell us which policy we should adopt, in part because their estimates were inevitably fuzzy and, under the circumstances, should have changed as information accumulated and in part because, notwithstanding the economists' best efforts, only devoted technocrats believe that costs to the economy and costs to human life and health can be measured by a single metric. Technocratic-driven policy choices, which of course have to be implemented through politics, proved to be unstable in the face of public skepticism about how much the experts really could tell us. "Following the science" can bring policy-makers to the point where they

could make reasonably well-informed choices, but “the science” could not and did not tell them what choice to make.

Perhaps, then, today’s administrative state is at a point structurally similar to the one the government had reached in the late nineteenth century: new problems posed by technological, economic, and social change, thrown at a governance system whose institutions are ill-adapted to deal with them. If so, what institutional responses might there be? After noting the possibility that the current situation is hardly as dire as deconstructionists and reconstructionists suggest, I describe the available institutional responses as deconstruction, tweaking, and reconstruction, acknowledging that the categories are not separated by sharp boundaries.

Perhaps, as Sunstein suggests, we should recommit ourselves to the Progressives’ technocratic vision, in the contemporary form of a comprehensive cost-benefit state. To Sunstein, skeptics about monetizing all sorts of costs and benefits are simply mistaken. On this view, students of the modern administrative state should do their best to show legislators and those they represent that cost-benefit analysis produces regulatory decisions that are better than any available alternative. Here David Lewis’s observation that the modern administrative state has been battered by decades of criticism of its performance comes into the picture.<sup>20</sup> We should tout such major successes of regulation as the dramatic improvement in the nation’s air quality to show that the modern administrative state works rather well. The point generalizes: regulating well is the best way to vindicate technocrats’ claims about the contributions they make to public welfare.

If the administrative state is not working well, though, what to do? In early work, Stewart glimpsed the possibility of deconstruction but thought that it could not take the forms most prominently offered by the administrative state’s conservative critics.<sup>21</sup> Those forms were deregulation and privatization. Both would remove the state entirely from the domain of regulation.

Today, I think, we should focus on the *administrative* part of “deconstructing the administrative state.” Deconstructing that state would mean dramatically scaling back the activities of administrative agencies without becoming committed in principle to no regulation at all. In a deconstructed administrative state, governments could regulate but would have to do so through detailed legislation rather than through delegations to administrative agencies. Privatization would mean not the complete transfer of authority to private corporations, but rather the design and interpretation of contracts between governments and those companies. The law of privatization would focus on what contract terms would best accomplish the purposes lying behind privatization, which typically involve taking advantage of entrepreneurs’ incentives to find cost-effective methods to achieve public-regarding goals such as safety or education.



Tweaking the administrative state today is a modestly conservative program to scale back judicially imposed additions (in the guise of interpretations) to the Administrative Procedure Act. In their contributions to this *Dædalus* issue, Aaron Nielson and Christopher Walker describe different routes to retrieving the APA's original goals of constructing an administrative law that gives proper scope to regulatory authority within bounds set by Congress, and Sean Farhang, in his essay, describes how tweaking is already occurring.<sup>22</sup> Placed in the argument developed here, tweaking is motivated by the adverse effects of importing the interest-group model of policy development into administrative law. Reducing the scope of "public interest" standing to initiate or challenge administrative action would enhance the agencies' independent expertise. Taking seriously the APA's requirement that rules be accompanied (only) by a short description of their purposes would allow agencies to replace efforts to "litigation-proof" their rules by providing extremely detailed explanation with efforts to develop better regulation. And, as Lewis emphasizes in his essay in this volume, tweaking the administrative state by funding it adequately would allow managers to get on with the work of regulating well.

Efforts to deconstruct and tweak the administrative state have models to build on. Reconstruction, in contrast, requires more imagination, even speculation. Artificial intelligence and automated regulation, discussed by Bernard Bell and Cary Coglianese in this volume, provide some hints of possibilities and might soon give us something like a proof of concept about a reconstructed administrative state.<sup>23</sup> So do Beth Noveck's descriptions in her essay of recent uses of big data in regulatory design and enforcement.<sup>24</sup>

An implicit exchange between Walker and Charles Sabel and Jeremy Kessler illustrates some possibilities. Both essays note that regulators have begun to use "guidance" documents – formally, statements about an agency's plans for implementing its interpretation of the statutes it is charged with enforcing – as forms of regulation. Though, in form, guidance documents merely state intentions, the targets of regulation, facing the possibility that they will have to mount an expensive defense of their practices, have strong incentives to conform to the agency's interpretations, which thereby have the same effect that a full-fledged regulation would. Except, as Walker observes in his essay, under current interpretations of the APA, targets who could readily challenge a statutory interpretation embodied in a regulation face substantial obstacles in obtaining judicial review of an interpretation offered in a guidance document. Echoing many others, Walker would tweak the current regime by expanding the opportunities to obtain judicial review of regulation by guidance.

In their essay, Sabel and Kessler, in contrast, place guidance in a broader framework.<sup>25</sup> As I have already noted, the Progressive themes of rapid technolog-

ical change have reemerged in thinking about reconstructing the administrative state. Sabel and Kessler see regulation by guidance as an innovative response to such change. Administrative law in its current form makes it time-consuming and costly for an agency to regulate by rule – one source of ossification. By the time an agency can work through rule-making, the problem it is trying to address will have changed shape. Regulation by guidance, Sabel and Kessler argue, restores the nimbleness and flexibility that modern governance requires.

But, in their view, it offers more. Retrieving ideas offered a century ago by Progressive philosopher and political theorist John Dewey, they argue that regulation by guidance is one of a family of alternatives to command-and-control or prescriptive regulation that can yield policies that can be adjusted to produce increasingly beneficial outcomes. They see regulation by guidance as similar to a more familiar form: regulation by output rather than input. Regulation by output sets goals that regulated companies or other regulated entities must reach – levels of pollution emitted, for example – and lets the regulated entity figure out how to reach them. The Deweyian insight is that the agency can then observe the choices the companies make and use that information to push forward more prescriptive regulations. Similarly with regulation by guidance: agencies can see how the entities they regulate respond to the incentives the guidance documents provide and deploy their expertise to evaluate the effectiveness of alternative responses, then move to more prescriptive regulation, or to less regulation, if experience shows that things are going reasonably well.

One feature of a reconstructed administrative state, then, might be building the process of learning-by-doing into the state's institutions. But, we might ask, *who* is to do the “doing”? One feature of the blood-sport politics of contemporary administrative law is deep contention over who gets to be a member of the leadership of today's alphabet agencies. Combine this with the “deliberative deficit” Avery White and Michael Neblo identify in their essay and the imaginative possibilities for substantial institutional innovation open up.<sup>26</sup>

White and Neblo put on the table the possibility of regulation by an administrative law parallel to the citizens' assemblies and similar bodies that have been used to develop policies across a range of topics. Within this framework, a “modest” program would have a central body prescribe regulatory goals and have citizens' assemblies devise implementation techniques appropriate to their local circumstances. That program can be founded upon the Deweyian idea that ordinary people combine common sense with local knowledge in ways not readily accessible to regulators more removed in time and space from the point of implementation.<sup>27</sup>

A more ambitious program would take participatory budgeting exercises as a model. The legislature would single out a relatively discrete problem, such as waste-water pollution at some industrial facilities. Groups of citizens would meet locally (both where the plants are located and where the plants' products are con-

sumed), discuss and debate regulatory proposals, and send the one they adopt to the next level, where another citizens' assembly would debate the various proposals they received, adopt one, and again send it up to the next level, ultimately with a single policy adopted, perhaps by a regulatory agency or a legislature, but perhaps instead by a "grand" national citizens' assembly.<sup>28</sup>

A variant would use a single, relatively small citizens' assembly as the sole decision-maker. In this model, a host of such assemblies is convened. Each deals with a single regulatory problem, defined narrowly (such as disposition of polluted waste water from fracking operations) or broadly (such as enhancing air quality in specified locations).<sup>29</sup> Members, who we can describe as "members of a regulatory agency," are chosen at random from the general population, compensated appropriately for their time, provided with general information about the problem, authorized to call upon whatever experts they think will be helpful, and – crucially – charged with coming up with fully enforceable regulations. With a large number of these "participatory regulatory agencies," every citizen would have some opportunity to be a lawmaker in some regulatory domain, satisfying at least some definitions of democracy, through a deliberative process.

**O**f course I have pushed the suggestions from the contributions to this *Dædalus* issue far beyond the limits of any individual essay. Yet in my view, serious consideration of deconstructing and reconstructing the administrative state requires highly speculative proposals coupled with small-scale efforts to provide proof of concept.<sup>30</sup>

The modern administrative state emerged in the late nineteenth century and took its current form in the late twentieth century. It was shaped by economics, technology, politics, and, of course, the U.S. Constitution. If it is to be reconsidered – defended anew, deconstructed, or reconstructed – those same forces will come into play, or perhaps better, have already come into play. From my narrow perspective as a constitutional lawyer, the next step will be to see whether or how any new form of the administrative state can be accommodated to the existing Constitution, or an amended one.

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#### ABOUT THE AUTHOR

**Mark Tushnet**, a Fellow of the American Academy since 2002, is the William Nelson Cromwell Professor of Law, Emeritus, at Harvard University. He is the author of *The Constitution of the United States of America: A Contextual Analysis* (2nd rev. ed., 2015), *Advanced Introduction to Comparative Constitutional Law* (2014), and *Routledge Handbook of Constitutional Law* (with Thomas Fleiner and Cheryl Saunders, 2012).

## ENDNOTES

- <sup>1</sup> Stephen Bannon quoted in Philip Rucker and Robert Costa, “Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’” *The Washington Post*, February 23, 2017.
- <sup>2</sup> Thomas O. McGarity, “Some Thoughts on ‘Deossifying’ the Rulemaking Process,” *Duke Law Journal* 41 (6) (1992): 1385–1462. Some scholars have questioned the “ossification” thesis, but it seems well-confirmed if limited to “major” regulations.
- <sup>3</sup> Susan E. Dudley, “Milestones in the Evolution of the Administrative State,” *Dædalus* 150 (3) (Summer 2021); and Peter L. Strauss, “How the Administrative State Got to This Challenging Place,” *Dædalus* 150 (3) (Summer 2021).
- <sup>4</sup> The latter is a reorganization of the words in a key provision of the Clean Air Act.
- <sup>5</sup> I find the labor example particularly telling. William Leiserson, a Wisconsin economist who was indeed a specialist in mediation, was a prominent early member of the NLRB. Within a few years, the NLRB became the locus of explicit political contention, at first between the American Federation of Labor and the Committee on (later Congress of) Industrial Organizations and then, more obviously, between labor and management.
- <sup>6</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877 – 1920* (Cambridge: Cambridge University Press, 1982).
- <sup>7</sup> Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009).
- <sup>8</sup> Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, Conn.: Yale University Press, 2012).
- <sup>9</sup> Julian Mortenson and Nicholas Bagley, “Delegation at the Founding,” *Columbia Law Review* 121 (2) (2021); and Nicholas Parrillo, “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s,” *Yale Law Journal* 130 (2021).
- <sup>10</sup> This accounts in my view for the prominent place Woodrow Wilson has in contemporary conservative narratives of the administrative state’s rise: during his career as a political scientist, Wilson argued for constitutional revision (or adaptation) that would give what he regarded as the emerging administrative state a firm constitutional footing.
- <sup>11</sup> Revisionists have not yet directed their attention to the intellectual origins of the Frankfurter-Landis story. I suspect that when they do so they will offer a complex account. One part might be U.S. scholars’ acceptance of A. V. Dicey’s view that French-style *droit administratif* was completely foreign to the common law tradition (and for that reason foreign to the traditions of U.S. constitutionalism). Another part might be the effort by scholars in academic fields that were establishing themselves in the late nineteenth century to show that their approaches yielded new insights into then-contemporary developments—academic entrepreneurship, in short.
- <sup>12</sup> The standard account of developments between the early New Deal and the enactment of the Administrative Procedure Act is George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,” *Northwestern University Law Review* 90 (4) (1996): 1557–1683.
- <sup>13</sup> There have been some important supplements to the APA, such as the Freedom of Information Act and the Government in the Sunshine Act. I think it significant, though, that

in law schools, the basic course in administrative law is about the APA, with advanced courses dealing with later accretions.

- <sup>14</sup> Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (8) (1975): 1669–1813.
- <sup>15</sup> On the latter, see Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2245–2385.
- <sup>16</sup> Neomi Rao, "The Hedgehog & the Fox in Administrative Law," *Dædalus* 150 (3) (Summer 2021).
- <sup>17</sup> Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (7) (1976): 1281–1316.
- <sup>18</sup> Thomas O. McGarity, "Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age," *Duke Law Journal* 61 (8) (2012): 1671–1762.
- <sup>19</sup> Cass R. Sunstein, "Some Costs & Benefits of Cost-Benefit Analysis," *Dædalus* 150 (3) (Summer 2021).
- <sup>20</sup> David E. Lewis, "Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?" *Dædalus* 150 (3) (Summer 2021).
- <sup>21</sup> Richard B. Stewart, "Madison's Nightmare," *University of Chicago Law Review* 57 (2) (1990): 325–356.
- <sup>22</sup> Aaron L. Nielson, "Deconstruction (Not Destruction)," *Dædalus* 150 (3) (Summer 2021); Christopher J. Walker, "Constraining Bureaucracy Beyond Judicial Review," *Dædalus* 150 (3) (Summer 2021); and Sean Farhang, "Legislative Capacity & Administrative Power Under Divided Polarization," *Dædalus* 150 (3) (Summer 2021).
- <sup>23</sup> Bernard W. Bell, "Replacing Bureaucrats with Automated Sorcerers?" *Dædalus* 150 (3) (Summer 2021); and Cary Coglianese, "Administrative Law in the Automated State," *Dædalus* 150 (3) (Summer 2021). Lacking expertise on these issues, I have a lurking suspicion that those more knowledgeable than I might be able to find such a proof of concept in projects that have already been implemented, were they to conceptualize the projects in the register of reconstruction.
- <sup>24</sup> Beth Simone Noveck, "The Innovative State," *Dædalus* 150 (3) (Summer 2021).
- <sup>25</sup> Jeremy Kessler and Charles Sabel, "The Uncertain Future of Administrative Law," *Dædalus* 150 (3) (Summer 2021).
- <sup>26</sup> Avery White and Michael Neblo, "Capturing the Public: Beyond Technocracy & Populism in the U.S. Administrative State," *Dædalus* 150 (3) (Summer 2021).
- <sup>27</sup> One might speculate about how local citizens' assemblies would have implemented COVID-19 regulations compared with what state governors did.
- <sup>28</sup> For a similar proposal, though with the locally adopted and forwarded proposals ending up as advisory to the legislature, see Camila Vergara, *Systemic Corruption: Constitutional Ideals for an Anti-Oligarchic Republic* (Princeton, N.J.: Princeton University Press, 2020).
- <sup>29</sup> As before, the legislature would define the problem, although one can imagine even broader changes that would replace traditional legislatures with one of the forms citizens' assemblies can take.
- <sup>30</sup> I believe that speculation about how these processes would work in connection with COVID-19 and climate change would be productive, if done with an appropriate combination of sympathetic enthusiasm and informed skepticism.



# How the Administrative State Got to This Challenging Place

*Peter L. Strauss*

*Written for a dispersed agrarian population using hand tools in a local economy, our Constitution now controls an American government orders of magnitude larger that has had to respond to profound changes in transportation, communication, technology, economy, and scientific understanding. How did our government get to this place? The agencies Congress has created to meet these changes now face profound new challenges: transition from the paper to the digital age; the increasing centralization in an opaque, political presidency of decisions that Congress has assigned to diverse, relatively expert and transparent bodies; the thickening, as well, of the political layer within agencies themselves; and the increasing judicial use of analytic techniques invoking the expectations of those who wrote the Constitution so long ago and in such different circumstances. Never easy, finding the appropriate balance between law and politics presents major challenges today.*

As the United States enters the third decade of the twenty-first century, almost two-and-a-half centuries after its Constitution was written, its federal government employs more than two million civilian employees.<sup>1</sup> Of these, more than 1,800 work directly for the President, in the Executive Office of the President (EOP). Virtually all the remainder – outside the seventy thousand or so employed by Congress and the federal judiciary – work in hundreds of government agencies and other institutions, performing tasks assigned to them by congressional legislation.<sup>2</sup>

Our Constitution's text addressing America's government (as distinct, that is, from the particular institutions of Congress and the presidency itself) has not been amended since the founding. Although conservative and libertarian voices increasingly insist that, absent amendment, only the founders' understandings can be honored, our Constitution must somehow be understood in relation to today's dramatically different circumstances, if our government is to continue functioning. In 1791, the first American census reported a population of 3,929,214 inhabiting an area of 864,746 square miles, roughly one percent of today's population, and one-quarter its present area with, correspondingly, a much lower population density. Its economy was predominantly agrarian,

leavened by small, local artisans and other businesses dealing directly with customers. Both travel and communication were impeded by distance, the means of transportation, and the available communication technology. The first Congress to meet once the Constitution was ratified created a Post Office and Departments of War, Navy, Foreign Affairs, and Treasury, each in unique ways suited to its responsibilities; this new government employed few civil servants to manage all its affairs. The first serious count of federal civilian employees, in 1816, reported that they numbered 4,837.<sup>3</sup>

While the Constitution has not changed, Congress has repeatedly created new Departments and new administrative agencies to meet problems arising as the nation and its economy matured. Its reactions to steamboat boiler explosions and fires on navigable American waters, with their high cost in lost lives and property, early illustrated its resourcefulness. An Act of 1838 created a licensing scheme in the Department of the Treasury, requiring various safety measures and providing for twice-a-year inspections by engineers appointed by U.S. district court judges. When this proved inadequate, Congress in 1852 created a Steamboat Inspection Service (SIS) headed by nine presidentially appointed regional inspectors empowered to oversee local inspectors the Secretary of the Treasury could discipline and to adopt implementing regulations. To refine this administrative structure, an 1871 law created a central office and emphatically reframed SIS authority to adopt governing regulations. Measures around the turn of the century placed all service employees except those presidentially appointed into the Civil Service, moved the SIS from the Treasury into the new Commerce and Labor Department, and again heightened its regulatory authority. The result, wrote leading legal scholar Jerry Mashaw, was to combine “something of the ‘New Deal’ independent, regulatory commission and ‘Great Society’ health and safety regulation by delegating administrative authority to a multimember Board that combined licensing, rulemaking, and adjudicatory functions.”<sup>4</sup>

As community-based artisans were replaced by factories and new forms of transportation and communication created a national economy, Congress repeatedly expanded federal administration, establishing government bodies to respond to such risks as discriminatory railroad freight charges, railroad equipment causing workplace carnage on the Civil War’s scale, impure foods that supplied national markets, unethical behaviors by large manufacturers and distant suppliers affecting those markets, and actions presenting unacceptable risks to the national economy. The states created public utility commissions, often separate from the elected executive, to control the behaviors of natural monopolies like electric utilities, telephone companies, or (in the countryside) railroad lines. Congress sometimes placed the regulatory bodies it created in conventional Cabinet Departments; but increasingly it created multimember bodies – the Interstate Commerce Commission and the Federal Reserve Board, for example – that

it placed outside the conventional executive government structure dominated by the President and Cabinet Secretaries.

At the beginning of the twentieth century, “administrative law” emerged as a distinct public law discipline in response to these societal changes. The federal Constitution presumes the existence of a government, yet it defines the powers and responsibilities of only the three institutions at its head: Congress, the President, and the Supreme Court. This was deliberate. The draft sent to the committee concerned with Article II in mid-August of 1787 proposed summarily to define a handful of particular Departments and their responsibilities, and to create a council modeled on parliamentary lines, while explicitly reserving to the President the right of decision after receiving its advice.<sup>5</sup> The draft of Article II returned to the Constitutional Convention, and adopted by it, rejected this approach. It empowered Congress to create all executive institutions below the President as well as any federal courts below the Supreme Court.

Anticipating those creations, the Constitution’s spare text refers both to Departments and to their heads, and requires the Senate’s consent to presidential appointment of the latter. It vests all executive power in a single elected President, charged with seeing that Congress’s laws would “be faithfully executed.” Yet in defining the President’s power in relation to the domestic government Congress was to create, and in contrast to the draft it rejected, the Constitution does not provide that the actions that government takes are to be the President’s; it says only that he may “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices.” Like the “faithful execution” clause, this language accepts that actual administrative duties will be placed in others than the President himself. Just what Departments there would be and how they would be organized – and in what relationship to the President, Congress, and the courts – was unstated. Our government is, in effect, the hole in our Constitution, a hole Congress has been filling with a remarkable variety of public and quasi-public institutions, possessing varying powers and responsibilities and in varying relationships with the President, Congress, and our courts, ever since.

Studying the institutions that the Constitution defines, then, could no longer suffice. Administrative law emerged as the discipline concerned with the actions of these manifold institutions. Congress, vested with legislative power, quickly understood that it was incapable of foreseeing the hazards the changes were bringing or providing for their control with the necessary speed and detail. Courts, looking at past events through spectacles fashioned by the prior generations’ perspectives, were poorly equipped to meet contemporary social needs. If the President ever had been capable of exercising personal control over all important government actions, that time quickly passed, and it early came to be understood (as the “Opinion, in writing” and “faithful execution” clauses entail)

that governmental duties were the direct responsibility of the institutions Congress had created to perform them.<sup>6</sup> In 1920, following the creation of the Federal Reserve and the Federal Trade Commission earlier in the twentieth century, nine Cabinet Departments (many housing within themselves discrete administrative bodies like the Agriculture Department's Forest Service) and at least two dozen distinct federal governmental bodies with regulatory responsibilities employed about 691,000 civil servants – now organized into a permanent Civil Service chosen for merit, not political connection – under the direction of a much smaller number of politically appointed officials.

The Great Depression of the 1930s brought in its wake the New Deal, reflecting new ambitions and activities, and greatly enlarging the national government. One consequence was the creation of the Executive Office of the President, quite small initially, to advise the President in his relations with the expanding network of government Departments and agencies. Another, spurred by the organized bar's pressure for more formal administrative procedures, was a remarkable empirical study of the procedures the federal government's many administrative agencies actually followed. This study informed the drive for greater uniformity, transparency, and control of agency actions that led, at the end of World War II, to the unopposed congressional enactment of the federal Administrative Procedure Act (APA) to govern the most formal elements of administrative action. This happened at a time when these actions were generally considered to be objective means of applying expertise to social issues, apolitical in their fundamental nature. The APA has since endured without significant amendment of its most central elements, but today, as the possibilities of apolitical expertise have come into question, its processes and their subjects have become highly politicized. The extent of national regulation is being hotly contested, the APA's procedures have been brought back to Congress's attention (albeit without, to date, significant legislation actually to change them), and the Trump administration took dramatic steps to politicize administrative processes.

When the APA was enacted, the principal focus of federal regulation was on high-consequence government actions involving regulation of individual actors, often economic in nature: for example, setting railroad rates, or choosing the routes an airline would be permitted to fly. These actions had long been taken after trial-like administrative procedures of considerable formality that judicial decisions essentially treated as a constitutional necessity (on-the-record adjudication, in the APA's terms, including a formal process for rate-making that, although denominated "rulemaking," strongly resembles what it requires of formal adjudication). Much of the political momentum the New Deal changes generated to define federal administrative procedures focused on these high-consequence decisions, which would directly affect the economic well-being of a particular railroad, airline, or telephone carrier. For almost two decades after the APA's adop-

tion, economic regulation associated with trial-like procedures was the central focus of its use.

Yet the APA also provided less formal “notice-and-comment” public procedures to govern agency adoption of regulations having a more general impact than would a single decision about a particular license, rate, or route. Such rules are, in effect, secondary legislation. If valid, they have the force of statutes, yet they are adopted by executive agencies, not by Congress. Rulemaking within the framework of enabling statutes had long been judicially tolerated, as long as those statutes provided a framework of intelligible standards that permitted courts to assess their legality. (Early in the twentieth century, for example, the Supreme Court had upheld a statute authorizing the Secretary of Agriculture to adopt regulations to secure the objectives of the national forest lands under his administration, and permitting criminal enforcement of one of those regulations, which the Secretary had adopted to control the grazing of sheep there.) For a quarter-century, rulemaking was little studied by either students or scholars of administrative law.

The late 1960s and 1970s brought profound changes. New statutes discarded or dramatically restructured much economic regulation and closed the agencies responsible for it (for example, the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, and elements of the Federal Communications Commission), as economists persuaded Congress that such regulation inappropriately constrained the operation of economic markets and the entry of new competitors into them. Increasing concerns about the transparency of government records, in the wake of McCarthyism and developing civil rights struggles, produced the Freedom of Information Act (FOIA) and then the Privacy Act that would bloom beyond all expectations; they contributed as well (along with significant concerns about the administration of welfare programs) to focused attention on the procedural rights of individuals caught up in both criminal and administrative disputes with the government. Now courts were persuaded that citizen-government relationships potentially involved entitlements, not merely beneficiary-benefactor relations; this “due process explosion” dramatically expanded both the caseloads of agencies dealing with individual relationships with government and the formality of the decision processes those agencies employed. In the wake of these developments came dramatic growth in the public provision and subvention of legal services.

At the same time, courts found in the importance of interests that statutes called on government to protect – such as aesthetic, recreational, or similar beneficiary interests – sufficient reason to permit judicial challenges to administrative decisions affecting them by anyone suffering their concrete impairment. These findings considerably expanded the set of persons having standing to challenge government actions. Combined with the possibility of challenging government regulations immediately upon their adoption, before their enforcement, it was



now possible for citizens or non-governmental organizations (NGOs) representing them to challenge regulations for having done too little, not too much, to protect the interests Congress had made an agency responsible to regulate. Regulators thought to have been tamed (“captured”) by the “daily machine-gun-like impact” of their interactions with the regulated now had to be concerned, as well, with the possibility of challenge from others.<sup>7</sup> The Audubon Society and the Sierra Club first appeared as litigants in federal court in 1969; by mid-June 2020, the number of their appearances stands at 2,335, having steadily increased decade after decade.<sup>8</sup>

Perhaps the most dramatic changes resulted from new public concerns about health, safety, and the environment, leading both to the enlargement of some existing regulatory authorities, such as the Food and Drug Administration, and to the creation of new ones, including the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, and the Environmental Protection Agency. Rulemaking was often the most influential procedure these agencies employed, and they used it in ways profoundly affecting whole industries (and, through them, the national economy). All automobile manufacturers would now have to equip their vehicles in prescribed ways; all factories using benzene would have to control their workers’ exposure to it; all coal-burning electric utilities would have to reduce the pollutants their smokestacks emitted. These high-impact rulemakings and their associated rulemaking procedures rapidly drew the attention of scholars, the courts, and “public interest” litigators asserting that agencies had failed adequately to protect the interests that statutes made them responsible to secure.

Although the courts eventually discredited efforts to convert the procedures used in these important rulemakings into a species of trial process (on the judicial model), they nonetheless interpreted the APA’s sparse language about rulemaking in ways that substantially embroidered its transparency and its demands. Perhaps building on FOIA’s clear commands, the courts now required agencies to expose scientific reports and similar data as elements of the statutory comment process. Although the APA’s language permits notice for comment of merely “a description of the subjects and issues involved,” courts required a new round of commentary for regulations that were not a “logical outgrowth” of the proposal made. And although Congress in 1946 would likely have expected judicial review of rulemaking to be like the light-fingered touch its statutes ordinarily received, now courts undertook to assure themselves that the agencies had taken “hard looks” at the issues they resolved: addressing significant comments filed by interested persons, demonstrating sound reasoning, and revealing a reasonable connection to the materials available to them. Richard Stewart, in influential scholarship, aptly characterized these developments as requiring a “paper hearing” comparable to legislative hearings, and as appropriately recognizing the differing claims on ju-

dicial respect owing to legislative action and administrative action.<sup>9</sup> By the 1980s, these developments had all become firmly established in the legal framework. Few voices were to be heard challenging their appropriateness.

As early as the Nixon administration, the model of administrative bodies as objective, essentially apolitical actors came into intellectual question, as neoclassical economic views and associated political science “public choice” theories took hold. Administrative agencies – and consequently their processes – have become considerably more political, and formalism and originalism have become more characteristic of judicial approaches to the issues of administrative law. Before dealing with these changes, however, which considerably predate the Trump administration, it is useful to give brief attention to another, whose consequences for the administrative state and regulation are only beginning to be felt: the transition from the paper to the digital age.

When agency adjudications and rulemakings had only paper records, particular items were discrete and existed in limited copies. Filing cabinets were physical, and their searchability depended on their organization and, perhaps, indexing. Parties to an adjudication would be entitled to receive copies of each document filed, and that filing would occur in a ritual order generally providing an opportunity for response. Notice-and-comment rulemakings, on the other hand, lacked discrete parties; all interested were entitled to comment. Comments were filed only with the proposing agency, and all comments – in support or in opposition – could be filed at the one deadline the agency had set to receive them. There was no provision for seeing others’ comments or responding to them. Although FOIA permitted anyone to ask to see all filed comments, this right was independent of the rulemaking itself, and hardly practical for any proposal inviting wide participation. Save how an agency might choose to engage with the outside world while processing comments – a process itself constrained by the paper record – the agency essentially had a monopoly on the information that had come to it. To the extent information is power, the agency was where the power was.

The transformation of government records from paper to digital formats has worked extraordinary changes. FOIA searches have been complicated by the new phenomenon of email chains combining many documents in one stream, but the capabilities of electronic search have also greatly eased them. Much more important, now that desired words, concepts, or references can be found almost instantaneously where they occur, searching government records generally has been transformed. As statutes now command, agencies have placed data and documents online in public electronic agency libraries – a veritable explosion in the transparency of governmental work and work-product. Regulations.gov, a unified site for notice-and-comment agency rulemaking, has simplified public participation, and now anyone interested can review filed comments and respond to them.

One consequence may be a certain loss of effective agency power in relation to the White House; since what is in the government “cloud” can be as easily viewed in the EOP as in the agency itself, agencies have lost any informational advantage the paper age had given them.

Governmental sharing of data sets and research results has fostered new possibilities for public-private actions: use of its geologic data permitted a private NGO to demonstrate the possible impacts of rising sea levels; a public database reporting toxic substance discharges, searchable by ZIP code, has encouraged discharge reductions that regulations do not yet require; and agency safety ratings influence consumer and manufacturer behaviors alike. If sensors embodied in waste discharge outlets or complex machinery provide signals to agencies as well as to their makers, agencies may be able to use artificial intelligence (AI) to identify more rapidly any issues warranting their response. The filing now of required reports in electronic form would also permit the automated creation of data sets. Indeed, the possibilities of artificial intelligence for learning from data – whether rulemaking comments or data collected from inspections, filed electronic reports, or other available data sets – have only begun to be explored. Although these possibilities are indeed exciting, one must remain aware that AI and algorithms are only as reliable as the humans monitoring and creating them.

On now to the issues of increasing political control and the associated displacement of the view that administrative action is justified by its objective expertise. The displacement was first evident in contexts of straightforward economic regulation. Bodies like the Interstate Commerce Commission (ICC) and Civil Aeronautics Board (CAB) came to be seen as having been captured by the very entities they were supposed to control, acting inefficiently in contexts where market competition would produce efficient results.<sup>10</sup> Pointing out mismatches in regulation failing adequately to account for the possible impact of market operations on corporate behaviors, then Harvard Professor, and now Supreme Court Justice, Stephen Breyer’s *Regulation and Its Reform*<sup>11</sup> underlay Congress’s choice to end the CAB and then the ICC, and to alter the responsibilities of other bodies, such as the Federal Maritime Commission, substantially. The consequence was significantly diminished economic regulation. Here, in eliminating “captured” regulators and empowering competitive markets, the impact of defeating the “expert agency” model was simple deregulation.

But in the realms of health, safety, and environmental protection, regulation depended on science – that is, on expertise. Competition had not produced safer cars, cleaner water or air, or workplace safety. Although the development of information regimes, marketable permits for pollutants, and the like might eventually provide the means of lessening direct regulatory commands – and regulators would learn the virtues of framing standards to be met rather than issuing commands defining precisely what must be done – none of these techniques would

work well to provide accurate information, monitor the use of permits, or define the standards to be achieved, in the absence of a regulatory apparatus. Despite the occasional termination of agency mandates, then, administrative government continued to grow, and the political opposition to regulatory measures denigrated the possibility of objective science and promoted political controls.

In a brilliant 2008 article, then Professor and current Judge David J. Barron called attention to complementary trends that, since the administration of President Nixon, had steadily promoted the political control of ostensibly science-based regulation: its centralization in the White House and the thickening of the political layer within the agencies themselves.<sup>12</sup>

Centralization first, the phenomenon that has attracted the bulk of scholarly attention in recent years. The Executive Office of the President, the White House collective providing the President with his best means for understanding and influencing administrative action, has grown from the six advisors President Franklin D. Roosevelt chose at its creation to more than 1,800 people; today, as in the Obama administration, it includes “czars” the President alone selects and charges with overseeing choices that Congress has assigned to Senate-confirmed agency heads. For internal agency political appointments, as well, loyalty to White House policy preferences has become the dominating consideration. One expression of this decades-long development can be seen in President Trump’s apparent preference to have “acting” officials responsible for administration, rather than appointees subject to the potentially conflicting loyalties that can come from the process of Senate confirmation; reportedly, he had empowered a young White House assistant simply to instruct agency heads whom to appoint to subordinate political posts Congress authorized them to appoint, as constitutionally it may.<sup>13</sup>

Rulemaking’s emergence as an activity having major impacts on the national economy has prompted steady growth in White House initiatives to gain control over its outcomes. These initiatives first appeared under the rubric of presidential oversight and coordination, drawing directly on the President’s constitutional power to “require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices.” They moved inexorably from White House supervision and advice to White House control. This development of White House direct engagement, beginning with President Carter’s Executive Order 12044, was well captured in the introduction to a 2017 Brookings Institution’s analysis, *Evaluating the Trump Administration’s Regulatory Reform Program*:

The regulatory process has been the rare policy area in which presidents from the two major parties have broadly agreed, building on each other’s efforts over the course of decades:

- President Carter formally launched White House oversight of major regulations (those with an estimated annual economic impact of at least \$100 million) issued by executive branch agencies with Executive Order 12044, which mandated that agencies conduct regulatory analyses before issuing major rules, including a consideration of their economic consequences, but did not require balancing costs against estimated benefits.
- President Reagan replaced Carter's order with Executive Order 12291, which was the first to require that agencies explicitly balance estimated benefits of major regulations against their costs, assuming their underlying statutes permit it, stating that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."
- President Clinton replaced that order with Executive Order 12866, which shifted from the requirement that benefits "outweigh" costs to the requirement that benefits "justify" costs, stating that "each agency shall assess both the costs and the benefits of the intended regulation and . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs."
- President George W. Bush lightly amended E.O. 12866 through Executive Order 13422 (later revoked by President Obama), extending the White House oversight requirements to guidance documents issued by executive branch agencies.
- President Obama's Executive Order 13563 reaffirmed the principles established in E.O. 12866, including that agencies should propose or adopt a regulation only if "benefits justify its costs."<sup>14</sup>

President Trump's executive orders on rulemaking, and insistence on speedy deregulation, strongly asserted presidential prerogatives of control. Consistent with his project to lift the heavy hand of government off industry's back, these executive orders stressed the elimination of existing regulations. They forbade agencies to issue new regulations without, in effect, White House permission, permission conditioned on a showing that the totality of costs the agency's rules imposed on the regulated would not then exceed a figure annually set by the Office of Management and Budget (the largest element of the EOP). What future benefits the rules might confer – or, for that matter, what benefits rescinded rules would have provided – were irrelevant. Perhaps unsurprisingly, the overwhelming majority of purported rescissions were found unlawful by courts in which they had been challenged, often for the haste of their adoption and for failures of reasoning. Examples include the Supreme Court's rejection of a citizenship question



in the census, and of the attempted rescission of President Obama's program of deferred action on "dreamers." From the writer's perspective, the more important observation is that Congress has placed these rulemaking responsibilities in the agencies, not the President, and that the steadily tightening presidential grip on these judgments (especially taken together with the increasingly partisan roadblocks in Congress) takes us back to George III, not to Philadelphia.

Politicization, then. The thickness of the political layer inside agencies has grown as well. Political scientist B. Guy Peters recently observed that,

A president in the United States can appoint approximately four thousand people to office, and four or even five echelons of political appointees may stand between a career civil servant and the cabinet secretary. In the United Kingdom each ministry will only have a few political appointments other than the minister or secretary of state in charge – the largest number now is the Treasury with six appointments – but even then, the major interface between political and administrative leaders occurs between the minister and a single career civil servant, the permanent secretary.<sup>15</sup>

While political layering is rising in UK agencies too, a particularly dramatic American shift occurred during the Carter administration, when Civil Service reforms moved essentially all civil servants with policy responsibility into a Senior Executive Service (SES), subject to much greater levels of control by the agency's political leadership than the Civil Service had permitted. The Trump administration's Secretary of the Interior Ryan Zinke reassigned many in his Department's SES staff to jobs unsuited to their abilities. Presidents long regarded the departmental and agency Inspectors General that Congress created in the same Civil Service reform statute as desirably nonpartisan, apolitical internal monitors of agency action, and permitted their service to span changing administrations. For President Trump, however, the signs of "disloyalty" suggested by inquiries into the actions of agency political leadership repeatedly became an occasion for dismissal.

Yet if the President's "taking control over the national administrative process . . . gets things done [and] brings coherence where none existed before," Professor Barron asks, "then what of social learning? What of alternative regulatory approaches? What then of the long view?" He continues:

The concern reflected in such questions . . . lies at the heart of what makes increased centralization and politicization so potentially troubling. These developments . . . have made the federal agencies increasingly ill-suited to perform their customary role of providing a mechanism for social learning. . . . [A] powerful institutional logic has increasingly made the federal bureaucracy a fully committed member of the White House regime. . . . [W]e should . . . be looking for ways to ensure that alternative voices are brought into the mix nonetheless.<sup>16</sup>

Turn now briefly to the courts and to the remarkable range of debates in and about them currently roiling the world of administrative law. When the APA was adopted, law school instruction about administrative law was largely concerned with the use of courts to control administrative processes, not political controls; courts, like agencies, were generally viewed as a collection of experts trained to act on the basis of objective and apolitical factors (“the law” and “justice”). The emergence of legal realism in the academies and prominent Supreme Court actions with high political valence (President Roosevelt’s Court-packing plan, defeated by the New Deal’s “switch in time” – in itself, one might think, a commitment to that apolitical view – and the civil rights decisions of the 1950s) may have contributed to an erosion of that view. Yet the academic framework of administrative law instruction was captured in the title of Louis Jaffe’s magisterial work *Judicial Control of Administrative Action*.<sup>17</sup>

The emergence of rulemaking brought the politics of administrative action to the forefront and contributed (alongside reactions to the liberalization of criminal procedures, civil rights litigation, and the abortion decisions) to the steadily increasing politicization of the judicial appointments process. The Senate’s increasingly partisan behaviors resulted in the abandonment of safeguards that had long controlled presidential ambitions to project their administration’s influence far into the future: respect for the inputs of Senators from states where vacancies had occurred and for the views of the organized bar, and the effective need to secure a supermajority in the face of opposition to any given appointment. During the Trump administration, Senate Majority Leader Mitch McConnell consistently gave the highest priority to confirming the President’s nominations to the federal courts.<sup>18</sup> Given the relative youth of the appointments made, the views of those judges may influence the outcomes of judicial decision-making for decades to come.

Perhaps not coincidentally, the legal framework for administrative law developed over the past decades has come into sharp question. Increasingly, courts are reasoning with formality, relying on dictionaries to determine the “plain meaning” of statutory terms, not attention to the political history of legislation, and generally favoring the original understandings of statutes and the Constitution. Serious questions are now being voiced about the lawfulness of Congress’s authorizations of agency rulemaking and agency adjudication. Rulemaking authority is characterized as a delegation of the “legislative power” only Congress can constitutionally enjoy, not the authorization of executive actions of a character to be found in every developed legal system. Agency adjudication is challenged as the exercise of the “judicial power” the Constitution reserves to federal courts, not executive action subject to judicial review. Long-established doctrine calling on the courts to respect agency policy choices made within the scope of the authority their statutes imperfectly define is being replaced by judicial decision about the meaning of statutes for whose administration they are not responsible, and with

whose complexity they are not familiar. The proposition that statutes can only mean what their words could have been understood to mean at the time of their enactment threatens the universally accepted “paper hearing” courts articulated in response to the emergence of rulemaking’s significance decades after the APA’s enactment. The titles and substance of two colleagues’ recent publications may suggest the tension: Professor Gillian Metzger’s *Harvard Law Review* Foreword, “1930s Redux: The Administrative State Under Siege,” and Professor Philip Hamburger’s book, *Is Administrative Law Unlawful?*<sup>19</sup>

These challenges have long underlain the world of American administrative law and the realities with which it deals, and they can be expected to endure. In recent times, a firestorm of other challenges has arisen that underscores both the necessity of a functioning government capable of dealing with the perils of the natural world, the economy, and human behaviors, and the political difficulties of achieving these ends in our constitutional republic. Partisanship has rendered Congress the “Broken Branch.”<sup>20</sup> A rise of renewed populism, threatening democracies across the world,<sup>21</sup> brought America the presidency of Donald Trump, with its repeated seeming indifference to the rule of law and “unprecedented, historic corruption.”<sup>22</sup> The President’s indifference also to the world of science, evident enough in his administration’s repeated rescissions of environmental standards and its refusals to take seriously the prospects created by climate change, propelled the United States to the forefront of nations suffering from the scourge of COVID-19, with its extraordinary challenges both to science and to an economy it has brought to its knees. Simultaneously, the police killing of George Floyd in Minneapolis has generated an understanding of institutional racism – of the fragility that obscures from Whites the ways in which their economic place and their perceptions have been built on a history of successful oppression of others – that may transform the ways in which the landmarks of American administrative law are understood.<sup>23</sup>

Jacques Lipschutz’s monumental “Bellerophon Taming Pegasus” towers four stories high over the portico of Columbia Law School, whence come these words written in my fiftieth year there. Symbolically, it represents reason taming unreason: indeed, because Bellerophon’s head in the sculpture merges with the wild horse’s body, it is man taming his own unreason. What a powerful metaphor for the work of law and perhaps, in particular, for the work of public law! The growing imbalance between reason and unreason in American administrative law is the occasion for deep concern, and a major challenge for our collective future.

## AUTHOR'S NOTE

Like the other essays in this collection, work on this essay was essentially complete before President Biden's inauguration, so that the impacts of that transition, actual and potential, are not considered. Ahmed Mabruk provided invaluable research assistance.

## ABOUT THE AUTHOR

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## ENDNOTES

- <sup>1</sup> In 2019, the number was 2.1 million if one counted the individuals it employed and about fifteen percent higher if one calculated "full time equivalents." Julie Jennings and Jared C. Nagel, "Federal Workforce Statistics Sources: OPM and OMB," R43590 (Washington, D.C.: Congressional Research Service, 2019).
- <sup>2</sup> Jennifer Selin and David Lewis, *Sourcebook of United States Executive Agencies*, 2nd ed. (Washington, D.C.: Administrative Conference of the United States, 2018), 12, provide numbers of federal agencies ranging from 118 to 600, depending on definitions.
- <sup>3</sup> See Deanna Malatesta, "Evolution of the Federal Bureaucracy," in *A History of the U.S. Political System: Ideas, Interests, and Institutions*, vol. 1, ed. Richard A. Harris and Daniel J. Tichenor (Santa Barbara, Calif.: ABC-CLIO, 2010), 373, 380.
- <sup>4</sup> Jerry L. Mashaw, "Administration and 'The Democracy': Administrative Law from Jackson to Lincoln, 1829–1861," *The Yale Law Journal* 117 (8) (2008); a more limited view of the SIS's functions is expressed in Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017), 96–102.
- <sup>5</sup> "The President of the United States shall have a privy council, which shall consist of the president of the Senate, the speaker of the House of Representatives, the chief justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established; whose duty it shall be to advise him in matters, respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." Morris draft of August 20, found in Thomas H. Calvert, *The Federal Statutes Annotated: Containing All the Laws of the United States of a Contained and Permanent Nature in Force on the First Day of January, 1903*, vol. 8 (New York: Edward Thompson Company, 1905), 200–202.
- <sup>6</sup> "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of

the law ; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.” William Wirt, Office of the Attorney General, Opinions of the Attorneys General of the United States, October 20, 1823, 624, 625. Roger Taney, as President Jackson’s Attorney General, gave him the same advice.

- <sup>7</sup> James Landis, *Report on Regulatory Agencies to the President-Elect* (Washington, D.C.: U.S. Government Printing Office, 1960), 69.
- <sup>8</sup> Lexis search of combined federal cases for “Name(Sierra Club) or Name(National Audubon Society),” conducted June 15, 2020.
- <sup>9</sup> Richard B. Stewart, “The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision-Making: Lessons from the Clean Air Act,” *Iowa Law Review* 62 (1977): 713, 731–733.
- <sup>10</sup> See, for example, Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955); and George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2 (1) (1971): 3–18.
- <sup>11</sup> Stephen Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard University Press, 1982).
- <sup>12</sup> David J. Barron, “From Takeover to Merger: Reforming Administrative Law in an Age of Agency Polarization,” *The George Washington Law Review* 76 (5) (2008): 1095.
- <sup>13</sup> Only “principal” officers need be named by the President and, for them, Senate confirmation is also required.
- <sup>14</sup> Ted Gayer, Robert Litan, and Phillip Wallach, *Evaluating the Trump Administration’s Regulatory Reform Program* (Washington, D.C.: The Brookings Institution, 2017), [https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform\\_gayerlitanwallach\\_102017.pdf](https://www.brookings.edu/wp-content/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf).
- <sup>15</sup> B. Guy Peters, *The Politics of Bureaucracy: An Introduction to Comparative Public Administration*, 7th ed. (New York: Routledge, 2018).
- <sup>16</sup> Barron, “From Takeover to Merger,” 1151–1152.
- <sup>17</sup> Louis Jaffe, *Judicial Control of Administrative Action* (Boston: Little-Brown, 1965).
- <sup>18</sup> By the middle of 2020, President Trump had made two hundred Article III appointments. See Russell Wheeler, “Trump’s 200th Judicial Appointment: Less Than Meets the Eye,” Brookings Institution, June 26, 2020, <https://www.brookings.edu/blog/fixgov/2020/06/26/trumps-200th-judicial-appointment-less-than-meets-the-eye/>.
- <sup>19</sup> Gillian Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017); and Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). As may be evident, his answer is “yes.” For a rejoinder, see Adrian Vermeule’s book review, “No,” *Texas Law Review* 93 (2015): 1547.
- <sup>20</sup> Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford: Oxford University Press, 2006); Mann and Ornstein produced two sequels as the problem deepened over the years.
- <sup>21</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).



<sup>22</sup> This is how Republican Senator Mitt Romney characterized President Trump's commutation of the prison sentence of Roger Stone, a long-time political ally. Peter Baker, "President Ignores Limit Honored Even by Nixon," *The New York Times*, July 12, 2020.

<sup>23</sup> Robin DiAngelo, *White Fragility: Why It's So Hard for White People to Talk about Racism* (Boston: Beacon Press, 2018). An extended blog symposium on the impact of implicit bias on administrative law, initiated July 13, 2020, may be found at "Symposium on Racism in Administrative Law," *Yale Journal on Regulation*, <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/>.

# Milestones in the Evolution of the Administrative State

*Susan E. Dudley*

*The modern administrative state, as measured by the number of agencies, their budgets and staffing, and the number of regulations they issue, has grown significantly over the last hundred years. This essay reviews the origins of the administrative state and identifies four milestone efforts to hold it accountable to the American people: passage of the Administrative Procedure Act in 1946, the economic deregulation of the 1970s and 1980s, requirements for ex ante regulatory impact analysis, and the establishment of White House review. These milestones reflect bipartisan consensus on appropriate constraints on executive rulemaking, but they have not succeeded in stemming the debate over the proper role for administrative agencies and the regulations they issue. New milestones may include judicial interpretations, legislative actions, and extensions to executive oversight.*

Chances are, ten years ago, most readers of this essay would not have been familiar with the term *administrative state*. Now it is common in political discourse. Use of the term on Twitter increased dramatically in early 2017 after President Donald Trump’s former strategist, Stephen Bannon, promised the “deconstruction of the administrative state,” but its origins go much further back.

According to *The Washington Post*, Bannon was referring to “the system of taxes, regulations and trade pacts that the president says have stymied economic growth and infringed upon U.S. sovereignty.” In this essay, I use *administrative state* to mean the federal agencies that make up the executive branch – such as the Department of Transportation, the Securities Exchange Commission, the Environmental Protection Agency, and the Food and Drug Administration – which, pursuant to authority granted from Congress, issue regulations that carry the force of law. It also includes several “independent” agencies that operate without direct oversight from the president, although recent Supreme Court cases have raised questions about how far that independence extends.

There is no question that the size and scope of the administrative state have grown over the last century. Today, scores of federal agencies issue thousands of regulations every year. The Code of Federal Regulations contains 242 volumes and

more than 185,000 pages. That is four times as big as the U.S. Code of Laws passed by Congress, which contains fewer than 44,000 pages.

Debate over the proper role for these agencies and the regulations they issue emerged early in the twentieth century and led to different measures aimed at ensuring they are consistent with the U.S. Constitution and accountable to elected branches of government and the people. This essay traces the origins of the administrative state, identifies several milestone efforts to hold it accountable to the American people, and suggests what the future may hold.

**L**aw and public administration scholars often attribute the term *administrative state* to Dwight Waldo's book of that title in 1948, although others point to earlier use in both the United States and elsewhere.<sup>1</sup> By the time Waldo was writing, debate over the proper role for administrative agencies had been raging for several decades. While executive agencies and departments are as old as the republic itself, the scope and reach of the administrative state have expanded over time, and with them, discussion of its proper role in the U.S. system of government.

Congress created the first modern regulatory agency, the Interstate Commerce Commission (ICC), in 1887. As a 1977 Senate report put it, "for close to 100 years Congress chose to exercise the commerce power directly, without the aid of regulatory agencies. . . . By 1887, Congress saw a need for delegating part of the task of regulating commerce."<sup>2</sup> The bipartisan, seven-member ICC adjudicated between railroads and shippers to regulate rates railroads could charge. In the decades that followed, Congress established a variety of agencies to regulate interstate trade, water and power, communications, commodity exchanges, and other areas of activity. These agencies were often outside of executive departments and structured to be somewhat independent of presidential control. Their members could only be dismissed "for cause" ("inefficiency, neglect of duty, or malfeasance in office") in contrast to political appointees in executive departments who served "at the pleasure of the president."

Federal courts played an important role in drawing boundaries for these agencies' activities. Recall that the U.S. Constitution grants the legislative branch the power to pass laws (Article I), it tasks the executive branch with administering and enforcing those laws (Article II), and it makes the judicial branch responsible for interpreting the Constitution and statutes (Article III).

Until the early twentieth century, the courts interpreted the separation of powers implicit in Articles I through III of the Constitution as prohibiting Congress from delegating its legislative powers to administrative agencies. In 1892, the Supreme Court declared: "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."<sup>3</sup> This is known as the *nondelegation doctrine*.

By 1928, the Supreme Court had softened this interpretation of the separation of powers. It took a different view of the nondelegation doctrine in *J. W. Hampton v. United States*, when it found that Congress could delegate legislative power as long as the statute included an “intelligible principle” to guide executive action.<sup>4</sup> That is, the Supreme Court said that delegation is constitutional as long as Congress provides executive agencies with an unambiguous standard to guide rule-making.

This interpretation was tested in the 1930s when the New Deal created numerous new regulatory agencies, including the National Labor Relations Board (NLRB) and the Securities and Exchange Commission (SEC) and increased the jurisdiction of existing agencies, such as by giving the Department of Labor jurisdiction over wages and work hours. Opponents of the New Deal (those concerned with the expansion of the administrative state) turned to the judicial branch to constrain agency actions.<sup>5</sup> In 1935, in *Panama Refining Co. v. Ryan* and *A. L. A. Schechter Poultry Corp. v. United States*, the Supreme Court invoked the nondelegation doctrine to invalidate two provisions of the National Industrial Recovery Act.<sup>6</sup> The Court found the Act unconstitutional because it provided the president (and private industry associations) “virtually unfettered” decision-making power.<sup>7</sup>

However, two years later, the landscape changed, and the focus of administrative reform efforts shifted to Congress. After Roosevelt’s threat to “pack the court,” the Supreme Court began to approve New Deal programs and agencies, signaling that New Deal opponents’ “only remaining recourse was in Congress.”<sup>8</sup>

New Deal opponents were not alone in advocating for reforms. President Roosevelt established the Committee on Administrative Management (known as the Brownlow Commission) to recommend measures to reorganize the executive branch. His message to Congress accompanying the Brownlow report raised concerns over the “chaos of establishments” with “overlapping, duplication, and contradictory policies,” and concluded:

The plain fact is that the present organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in accordance with the laws enacted by the Congress. Under these conditions the Government cannot be thoroughly effective in working, under popular control, for the common good.<sup>9</sup>

The president did succeed in reorganizing the executive, including establishing the Executive Office of the President, but debate on the proper role of administrative agencies continued. This debate paved the way for the first milestone in constraining the administrative state, almost a decade later: passage of the Administrative Procedure Act.

The Administrative Procedure Act (APA) of 1946 followed more than a decade of debate on the question of unconstitutional delegation and reflected a “fierce compromise” balancing the competing goals of bureaucratic expertise and legislative accountability.<sup>10</sup> Its requirements – that regulations be grounded in statutory law and an administrative record that includes public notice-and-comment – continue to guide rulemaking today.

Legal scholar George Shepherd has provided a fascinating account of the shifting coalitions and aborted efforts at administrative reform between 1937 and 1946.<sup>11</sup> Early in that period, the American Bar Association (ABA) supported legislation that would have created an administrative court to oversee administrative agencies, especially disfavored New Deal agencies, such as the NLRB, the Department of Labor’s Wage and Hour Division, and the SEC. Progressive members of Congress and the agencies themselves objected to these proposals and, in response, President Roosevelt established the United States Attorney General’s Committee on Administrative Procedure in 1939 to study administrative reform and propose alternative legislation.

In 1940, Congress passed the Walter-Logan bill, with support from the ABA and conservatives in Congress. President Roosevelt vetoed the bill, which would have required agencies to present a record of findings supporting decisions and issue interpretive rules after notice and opportunity for hearings. Perhaps most important, it would have subjected agency actions to judicial review of jurisdictional questions as well as whether they were supported by substantial evidence.<sup>12</sup>

The Attorney General’s Committee, composed of distinguished nongovernmental lawyers and a small staff, subsequently offered two bills, one drafted by its majority and another by its minority. The majority’s bill offered small reforms, codified some existing practices, and would have established an Office of Administrative Procedure to recommend further changes, as appropriate. The minority’s bill contained judicial review provisions similar to the Walter-Logan bill and recommended that agencies first propose rules and receive public comment before issuing regulation. Congress debated these bills extensively in 1941 but set them aside after the declaration of war on Japan and Germany that December.

The emergency powers used during the war constrained individual freedom and, according to the ABA, “illustrated and emphasized the admitted defects of administrative justice.”<sup>13</sup> However, the war also forced compromise and cooperation. Shepherd notes that proponents of reform and the administration “sought to avoid a pitched political battle during war; each side sought to avoid creation of a public perception that it was willing to impede the war effort for partisan advantage in other areas.”<sup>14</sup> Bills introduced in 1944 attempted to find middle ground between the administration, agencies, New Deal opponents in Congress, and the ABA.

These efforts reached fruition on June 11, 1946, when President Truman signed the Administrative Procedure Act into law. It established procedures an agency



must follow to promulgate binding rules and regulations within the area delegated to it by statute. Agencies must provide public notice of all rules and provide an opportunity for public comment. Final rules are subject to judicial review to determine whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” among other things. For administrative adjudications, in which the enabling statute calls for public hearings on the record, decisions must be based on substantial evidence. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations. According to Shepherd:

The landmark Administrative Procedure Act of 1946 and its history are central to the United States’ economic and political development. The APA was the bill of rights for the new regulatory state. In a new era of expanded government, it defined the relationship between government and governed. The APA’s impact has been profound and durable and represents the country’s decision to permit extensive government, but to avoid dictatorship and central planning. The APA permitted the continued growth of the regulatory state that exists today.<sup>15</sup>

Though there are indications that the tide may be turning, as discussed below, the Supreme Court has not overturned legislation or regulation on nondelegation grounds since the 1930s. Indeed, in 1989, the Supreme Court found that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>16</sup>

Congress has supplemented the APA through legislation tailored to specific programs and passed government-wide procedural laws (such as the Freedom of Information Act of 1966 and the Government in the Sunshine Act of 1976). However, the APA, one of the most important pieces of legislation ever enacted in the United States, has guided executive branch rulemaking without significant amendment for seventy-five years.

**E**conomic deregulation offered the second milestone. The administrative agencies formed during the New Deal and earlier generally issued “economic regulations” governing economic activities of particular industries using controls such as price ceilings or floors, quantity restrictions, and service conditions. These regulations were justified as necessary to protect consumers from the exercise of producers’ market power, or to protect the industry from “destructive competition.”

Most of these agencies were established as independent commissions to avoid political influence, but were they serving the public interest? Scholars in the fields of economics, antitrust, and law found that regulatory agencies such as the ICC,

the Civil Aeronautics Board (CAB), and the Federal Communications Commission (FCC) seemed to get “captured” by the industries they regulated.<sup>17</sup> They argued that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers.<sup>18</sup>

Policy entrepreneurs at think tanks (especially the Brookings Institution and American Enterprise Institute), officials in the Ford, Carter, and Reagan administrations, and legislators in Congress brought these observations and academic insights to the policy realm. They linked regulatory impacts to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.<sup>19</sup>

The CAB, established in 1938, illustrates both the structure and authorities of these administrative commissions and the evolution of public opinion and policy with respect to them. The CAB board comprised five members; the president designated one to be chairman, and not more than three could be of the same political party. Congress tasked the CAB with reviewing and approving routes and rates for air travel that are “in the public interest and in accord with public convenience and necessity.” Administrative law judges would hold public hearings on rates, with disputes being resolved by the board. According to a contemporary case study:

Under its rate-setting philosophy, the CAB totally prevented price competition. All airlines charged the same fares for the same flights. When one raised prices, all followed suit. The market was further limited by the Board’s consistent refusal to allow new competition into the arena. In the name of protectionism, the last thing the Board felt “in the public interest” was more competition, so all certificates for entry were denied.<sup>20</sup>

In response to concerns about regulatory impacts, President Gerald Ford called for “a joint effort by the Congress, the executive branch, and the private sector to identify and eliminate existing Federal rules and regulations that increase costs to the consumer without any good reason in today’s economic climate.”<sup>21</sup>

At about the same time, Senator Ted Kennedy, chair of the Senate Judiciary Subcommittee on Administrative Practice and Procedure, engaged then Harvard Law Professor Stephen Breyer to help guide the subcommittee’s activities. Breyer’s background was in economic regulation and administrative law, so he steered the subcommittee toward a “long-range systematic study of economic regulation” through a series of hearings beginning with the CAB. Breyer argued it would be possible to “line up a group of political forces all in favor [of deregulation] ranging from Senator Thurmond and the administration, and all the traditional laissez-faire Republicans, on the one hand, and over to Ralph Nader and the consumer Democrats on the other.”<sup>22</sup> He was right.

Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the CAB and the ICC, and removal of unnecessary regulation in several previously regulated industries, with resulting improvements in innovation and consumer welfare.<sup>23</sup>

The transportation and telecommunications deregulation that took place in the 1970s and 1980s lowered consumer prices and increased choices. By 1993, the deregulated industries (trucking, rail, air, and telecommunications) produced efficiency improvements equivalent to a 7–9 percent increase in GDP.<sup>24</sup> Competitive markets have not just reallocated resources but generated tens of billions of dollars per year in benefits for consumers and society as a whole, in addition to beneficial changes to markets that were not anticipated prior to deregulation.<sup>25</sup>

Presidential requirements for regulatory impact analysis before issuing regulation became the third milestone. At the same time that economic forms of regulation were declining in the 1970s, a new type of “social regulation” was emerging, aimed at protecting health, safety, and the environment. Concerns over the reporting and compliance burdens of these new rules led to the next wave of regulatory reform, focused not on deregulation, but on ensuring that regulatory benefits outweighed costs.

In 1978, President Jimmy Carter issued Executive Order (E.O.) 12044, which required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and, when regulation was necessary, choose the least burdensome approach. Carter also required agencies to make their regulatory analyses available to the public when proposing new rulemaking.

In 1981, President Ronald Reagan replaced Carter’s order with E.O. 12291, which formalized regulatory analysis requirements and directed that “regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.” As discussed in the next section, it also established review procedures that increased incentives for conducting analysis.

In 1993, President Clinton rescinded Reagan’s executive order and replaced it with E.O. 12866, though the new order reinforced the philosophy that regulations should only be issued if required by law or a “compelling public need.” It directed agencies to base rules on an analysis of the costs and benefits of all available alternatives and to select “regulatory approaches that maximize net benefits” to society unless otherwise constrained by law.

More than twenty-five years and several presidential administrations later, E.O. 12866 still remains in effect. Subsequent presidents have maintained and supplemented its requirements, including, for example, President Obama’s E.O. 13563 and President Trump’s E.O. 13771. Regulatory impact analysis and benefit-cost balancing have become standard practice in most regulatory agencies, and it is in-

creasingly expected by reviewing courts. Further, developed countries around the world have adopted regulatory analysis as a way “to improve policy coherence and promote economic welfare through better quality regulation.”<sup>26</sup>

According to a 2011 Office of Management and Budget (OMB) circular:

Regulatory analysis is a tool regulatory agencies use to anticipate and evaluate the likely consequences of rules. It provides a formal way of organizing the evidence on the key effects – good and bad – of the various alternatives that should be considered in developing regulations. The motivation is to (1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.

The OMB continues, “regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government.”<sup>27</sup>

**T**he fourth milestone on the road to the modern regulatory state is the centralized review of regulations before they are issued. While Presidents Reagan and Clinton established the White House review procedures that largely remain today, the roots of that oversight go further back.<sup>28</sup> In 1971, President Richard Nixon instituted a “Quality of Life Review” program that required agencies to submit for OMB review agendas of regulatory actions and certain proposed and final rules along with their supporting analysis before publication in the *Federal Register*.

President Ford gave the OMB responsibility for coordinating oversight of agencies’ “inflation impact statements” (later “economic impact statements”) and directed agencies to submit to the Council on Wage and Price Stability (CWPS) “a copy of the proposed rule or regulation, the accompanying certification, and a brief summary of the agency’s evaluation” of costs, benefits, and alternatives considered.<sup>29</sup> According to Murray Weidenbaum, who later chaired President Reagan’s Council of Economic Advisors, “the driving force behind Ford’s review process was the Review Group on Regulatory Reform . . . a policy-coordinating mechanism used in the Ford White House.”

When he took office, President Carter abandoned some of the Nixon and Ford procedures but established his own cabinet-level Regulatory Analysis Review Group to serve as an “expert regulatory ‘watchdog’” to review agencies’ most important regulatory proposals. It was supported by CWPS economists and backed up by senior officials in the White House, OMB, and Council of Economic Advisors. Carter further centralized the coordination of executive oversight in 1978 with his Regulatory Council, which included representatives from independent as well as executive agencies. It was responsible for a semiannual agenda of regulatory actions and an:

agenda of regulatory reform proposals which stressed: (1) enhancement of presidential oversight; (2) institutionalization of cost-benefit regulatory assessment procedures; (3) adoption of flexible regulatory alternatives and market mechanisms in lieu of traditional command and control regulation; and (4) further examination of non-governmental solutions (such as greater insurance availability) to problems previously viewed as primarily regulatory in character.<sup>30</sup>

A month before he left office, President Carter signed the Paperwork Reduction Act of 1980, which established the Office of Information and Regulatory Affairs (OIRA) in the OMB to review and approve all new reporting requirements to minimize the burdens associated with the government's collection of information. When President Reagan took office in 1981, he further centralized and formalized regulatory oversight by giving the newly created OIRA a gatekeeper role in reviewing draft regulations – as well as paperwork – to ensure they were consistent with his E.O. 12291. Unlike previous review practices, Reagan required executive agencies to submit all regulations to OIRA and not to publish them until OIRA had completed its review. He also issued E.O. 12498, which required publication of the annual *Regulatory Program*, coordinated by OIRA, which listed the most significant upcoming regulations to “improve the management of regulatory activity within the Executive branch” and “provide the public and the congress with a greater opportunity to learn about and evaluate . . . regulatory priorities and procedures.”

Although Reagan's centralized regulatory review was initially controversial, each subsequent president has continued and expanded OIRA's central regulatory oversight role. As noted, President Clinton retained the key features of OIRA regulatory review. Clinton narrowed OIRA's purview to rules deemed “significant,” and his order softened Reagan's rhetoric, with the preamble emphasizing “planning and coordination,” reaffirming “the primacy of Federal agencies in the regulatory decision-making process” and promising to “restore the integrity and legitimacy of regulatory review and oversight” and “make the process more accessible and open to the public.” It replaced the *Regulatory Program* with the semiannual *Unified Regulatory Agenda*, listing “all regulations under development or review,” and the annual *Regulatory Plan*, providing more detail on “the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.” Unlike Reagan, Clinton included independent regulatory agencies in this planning process, though not in the requirement to submit individual regulations to OIRA for review.

Presidents George W. Bush, Barack Obama, Donald Trump, and Joseph Biden all retained the Clinton procedures for White House oversight of regulations and continued to assign OIRA responsibility for crosscutting administration-wide activities. President Obama's E.O. 13563 raised concerns over “redundant, inconsistent, or overlapping” regulations and encouraged greater “coordination, simpli-



fication, and harmonization.” President Trump’s E.O. 13771 (rescinded by President Biden) made OIRA responsible for carrying out its requirements for agencies to offset the costs of new regulations by removing or modifying existing rules.

OIRA’s regulatory oversight role has several functions, including coordinating interagency disputes on regulation, liaising with White House officials to ensure regulations are consistent with presidential policies, and reviewing agency regulatory impact analyses to offer what President Obama called a “dispassionate and analytical second opinion” on agencies’ actions.

As Justice Elena Kagan, then a professor at Harvard Law School, observed in her landmark article on presidential administration, presidents confront a principal-agent problem: “In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy.”<sup>31</sup> OIRA serves as monitor and as representative of the president’s priorities on regulatory matters, but those are not its only roles. As an aggregator of information and perspectives across the executive branch, it serves an essential coordinating function in an expansive bureaucracy made up of myriad narrow-mission entities.<sup>32</sup> Its staff of career regulatory experts is a source of institutional knowledge that endures across administrations. White House staff bring their political perspectives to regulatory policy, to be sure, but OIRA’s cadre of career professionals with their expertise, knowledge, and cross-cutting perspective bring useful insights and experiences to presidential decisions.

**T**hese four milestones – passage of the Administrative Procedure Act, economic deregulation, regulatory impact analysis, and White House review – have shaped regulatory practice in the United States. The constraints they have imposed have done little to reduce either the stock or flow of new regulations, however, and concerns that executive-made laws are not appropriately accountable to American voters remain. Changes related to judicial oversight, legislative action, application of regulatory analysis retrospectively to existing rules, extension of OIRA oversight to independent regulatory agencies, and more concerted efforts at regulatory budgeting may yet mark new milestones.

*Greater judicial oversight.* As noted earlier, since the mid-1930s, the courts have generally been deferential to Congress and agencies when it comes to regulation, leading many to conclude that the nondelegation standard is dead.<sup>33</sup> The landmark 1984 Supreme Court case *Chevron U.S.A. v. Natural Resources Defense Council* established the *Chevron* deference principle, which holds that, in the face of ambiguous statutory language, courts should defer to an agency’s interpretation of its statutory authority as long as it is reasonable, even if it is not the best interpretation. In legal scholar Peter Wallison’s words, *Chevron* is “the most important single reason that the administrative state has continued to grow out of control.”<sup>34</sup>

Yet this deference may be changing. There is growing interest in challenging the “intelligible principle” standard and reviving the nondelegation doctrine. Recent opinions suggest that some in the judiciary, including perhaps a majority of Supreme Court justices, are open to revisiting both *Chevron* and nondelegation doctrines.

Additionally, the Supreme Court appears to be paying more attention to whether agencies justify their decisions with sound regulatory impact analysis.<sup>35</sup> In 2015, it rejected an Environmental Protection Agency (EPA) regulation as arbitrary because the EPA had not weighed both the costs and the benefits, concluding that “against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”

*Legislative support for regulatory procedures and analysis.* Two of the milestones described here – passage of the APA and economic deregulation – benefited from bipartisan support across all three branches of government. In contrast, requirements for regulatory impact analysis and executive oversight have been largely the purview of the executive branch, with only sporadic support from Congress. While some crosscutting procedural laws, such as the Unfunded Mandates Reform Act (1995) and Regulatory Flexibility Act (1980), include requirements for agencies to develop estimates of the costs and benefits of certain regulations, their coverage is more limited than the presidential orders.

To ensure the continuity of regulatory impact analysis, Congress could reinforce the bipartisan principles embodied in presidential executive orders, especially Clinton’s E.O. 12866 and Obama’s E.O. 13563. Such codification would lend congressional support to the orders’ nonpartisan principles and the philosophy that before issuing regulations, agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select regulatory options based on an understanding of social benefits and costs. Ideally, such a requirement would override authorizing statutes that ignore or explicitly prohibit analysis of trade-offs.

While executive orders include language explicitly precluding judicial review, Congress could make compliance with analytical requirements judicially reviewable. Regulatory scholars Reeve Bull and Jerry Ellig found that explicit mandates for regulatory analysis appear to produce not only relatively sophisticated agency economic analyses, but more rigorous judicial review as well.<sup>36</sup> Congressional action on regulatory practice could also support other potential milestones, including extending regulatory analysis requirements to independent regulatory agencies, better retrospective evaluation of existing regulations, and regulatory budgeting.

*Retrospective evaluation.* Since Carter’s E.O. 12044, presidents have directed agencies to apply regulatory impact analysis retrospectively to be sure existing rules are having their intended effects. Reagan’s E.O. 12291 applied to existing as well as new rules, and Clinton’s E.O. 12866 directed each agency to “periodical-

ly review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order." Obama's E.O. 13563 directed agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

These directives have met with limited success, however, and agencies devote much less analysis to evaluating the impacts of their regulations once they are in effect than they do to estimating hypothetical impacts before they are issued. This may be largely because executive directives have not changed underlying incentives. Unlike other government programs that are reassessed each time their funds are appropriated, regulations, once created, tend to exist in perpetuity.

In theory, Trump's regulatory budget initiative that made the issuance of new regulations contingent on finding a regulatory cost offset could have provided incentives for agencies to evaluate both the costs and effectiveness of existing programs. However, as implemented, Trump's regulatory budgeting process did more to slow the pace of new rulemaking than to evaluate the merits of regulations on the books. Agencies chose not to pursue new initiatives that would have required cost offsets from revisions to existing regulations.

The key to better retrospective regulatory evaluation may lie in developing an evaluation plan when a rule is first issued and committing to gathering the data needed for evaluation. Further, designing regulations from the outset in ways that allow variation in compliance would provide natural experiments from which to learn from experience. The successful economic deregulation of the 1970s and 1980s benefited from such natural experiments. Intrastate airline fares not subject to the CAB's rate-setting authority were markedly lower than interstate fares, providing a powerful counterfactual for what interstate prices could be with more competition.

*Independent regulatory agencies.* As noted above, because presidents' ability to remove independent agency commissioners is more constrained than for executive agency appointees, they have been hesitant to require centralized review. The executive orders governing OIRA review issued by Presidents Reagan (E.O. 12291), Clinton (E.O. 12866), Obama (E.O. 13563), and Trump (E.O. 13771) all excluded independent regulatory agencies. As a result, independent agencies have traditionally performed lower-quality analysis than executive branch agencies.<sup>37</sup>

Presidents have become less reluctant to exert oversight over independent agencies, however. Obama's E.O. 13579, "Regulation and Independent Regulatory Agencies," *encouraged* independent regulatory agencies to comply with E.O. 13563's provisions for "public participation, integration and innovation, flexible

approaches, and science . . . to the extent permitted by law” and *directed* them to release public plans regarding how they would periodically review their existing significant regulations. Legal experts have found that, while the exact approach to oversight may differ depending on independent agencies’ authorities, presidents could require more analysis and review.<sup>38</sup> Congress has introduced bills that would explicitly allow the president, by executive order, to subject independent regulatory agencies to the executive analytical requirements applicable to other agencies. Several bills have also attempted to impose analytical requirements on specific independent agencies, such as the FCC and the SEC.<sup>39</sup>

*Regulatory budget.* In theory, President Trump’s regulatory budgeting requirements could have provided stronger incentives for retrospective evaluation. Executive Order 13771 required agencies to 1) offset the costs of new regulations by removing existing burdens and 2) eliminate two regulations for every new one they issue. Trump also set up a Regulatory Reform Task Force within each agency to make recommendations for regulatory reforms (E.O. 13777). President Biden revoked both of these orders on his first afternoon in office.

The idea of a “regulatory budget” had been discussed in academic and policy circles prior to 2017.<sup>40</sup> In 1980, President Carter’s *Economic Report of the President* discussed proposals “to develop a ‘regulatory budget,’ similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits.” The *Report* noted analytical problems with developing a regulatory budget, but concluded, “tools like the regulatory budget may have to be developed” if governments are to “recognize that regulation to meet social goals competes for scarce resources with other national objectives” and set priorities to achieve the “greatest social benefits.”

A meaningful regulatory budget would benefit from legislative as well as executive action. When passing new statutes authorizing regulatory activity, Congress is often clear on what benefits it expects those regulations to generate. It could also set limits on the costs, so agencies are not unconstrained in issuing regulations, but are mindful of Congress’s intent with respect to the burdens those regulations pose on the American people.

**T**he modern administrative state, as measured by the number of agencies, their budgets and staffing, and the number of regulations they issue, has grown significantly over the last hundred years. The four milestones reviewed in this essay reflect bipartisan consensus on appropriate constraints on executive rulemaking, but they have not succeeded in stemming the debate over the proper role for administrative agencies and the regulations they issue. New judicial interpretations, legislative actions, and extensions to executive oversight could emerge as the next milestones of constraint on the administrative state.

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# Legislative Capacity & Administrative Power Under Divided Polarization

*Sean Farhang*

*Conventional wisdom holds that party polarization leads to legislative gridlock, which in turn disables congressional oversight of agencies and thus erodes their constitutional legitimacy and democratic accountability. At the root of this argument is an empirical claim that higher levels of polarization materially reduce legislative productivity as measured by the number of laws passed or the number of issues on the legislative agenda addressed by those laws, both of which are negatively associated with party polarization. By focusing on the content of statutes passed rather than their number, this essay shows that in the era of party polarization and divided government, Congress has actually 1) enacted an ever growing volume of significant regulatory policy (packaged into fewer laws); 2) increasingly employed implementation designs intended to limit bureaucratic and presidential power; and 3) legislated regulatory policy substance in greater detail (reducing bureaucratic discretion) when relying on litigation and courts as a supplement or alternative to bureaucracy. This essay thereby complicates, both empirically and normatively, the relationship between Congress and administrative power in the era of party polarization and divided government.*

Political scientists and scholars in cognate disciplines have in recent years devoted a great deal of attention to the issue of political polarization: polarization of political parties, other elites, and the public; and polarization's causes and consequences.<sup>1</sup> As to political parties, this literature on polarization has identified two main dimensions. The Democratic and Republican Parties have grown more distant from one another, and each has become more ideologically homogenous and cohesive.<sup>2</sup> This is a signature feature of contemporary American politics and governance.

A clear consensus has emerged about Congress: party polarization contributes to “stalemate,” “gridlock,” “incapacity,” and “disfunction.” Compromise is necessary for a bill to navigate Congress's many veto gates: committees, bicameralism, the Senate filibuster, and a two-thirds vote in both chambers in the event of a presidential veto. As the parties become more distant from one another and more ideologically homogenous and internally cohesive, there is less common ground

in their legislative agendas, less opportunity for compromise, and more incentive to work for the opposition's failure. In an institutionally fragmented Congress, the result of polarization is paralysis.<sup>3</sup>

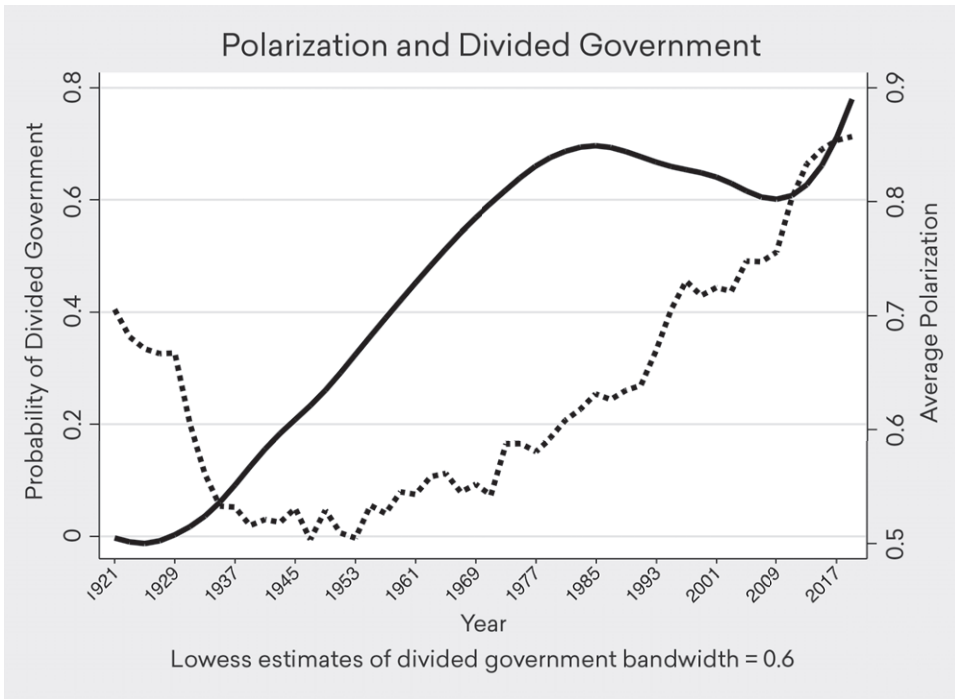
The story of contemporary party polarization has a critical wrinkle. The legislative paralysis account is theoretically clearest in the context of divided government. If a more homogenous and cohesive party controls both chambers of Congress and the presidency – no matter how ideologically distant from the opposition – Congress may be *more* productive, not less, if the controlling party has a sufficient margin of seats to enact statutes without support from the opposition. Under divided government, however, cross-party negotiation and compromise becomes necessary. The threat of legislative paralysis is most clearly present under the combination of divided government and polarization.<sup>4</sup>

This combination is, of course, characteristic of our time. The most widely used measure of party polarization is the difference between the mean scores of Democratic and Republican members of Congress on the DW-NOMINATE ideology scale, which is based on roll call votes.<sup>5</sup> This distance has been steadily increasing since about 1970 and, by 2020, it reached the highest level of the past century. The frequency of divided government has grown with polarization. From 1900 to the election of Richard Nixon in 1968, we had divided government only 20 percent of the time. From Nixon through Trump's first term, it was divided 69 percent of the time. The estimated probability of divided government heading into the 2020 election was 78 percent, the highest in the past century. Figure 1 shows polarization (DW-NOMINATE averaged across the House and Senate; dotted line) and the estimated probability of divided government over the last century. I will refer to the era from about 1970 to the present as one of “divided polarization.”

What have been the implications of divided polarization for administrative power? Probably the most common answer is that it enlarges administrative power. Under a system of separation of powers and checks and balances, Congress, the president, and federal courts supervise the administrative state and maintain its fidelity to law and accountability to the electorate. But according to the conventional wisdom just discussed, under divided polarization, Congress is disabled by legislative gridlock, stalemate, and incapacity. Legislative oversight of bureaucracy is a casualty. This widens agencies' (and presidents') policy-making berth and increases the range of actions they can take without fear of legislative reprisal.<sup>6</sup>

The normative implications of congressional incapacity are, not surprisingly, generally regarded as unhappy ones. As political scientists Michael Barber and Nolan McCarty note: “Perhaps one of the most important long-term consequences of the decline in legislative capacity caused by polarization is that Congress's power is declining relative to the other branches of government.”<sup>7</sup> The American administrative state's legitimacy hinges on meaningful congressional oversight to

Figure 1  
Polarization (Dotted Line) and Divided Government, 1921 – 2020



Note: The polarization measure uses the DW-NOMINATE ideology scale, first developed in Keith Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (Oxford: Oxford University Press, 2000).

ensure agencies' democratic accountability. "A perpetually gridlocked Congress," according to administrative law scholar Cynthia Farina, would produce "imbalance in control and accountability . . . rais[ing] hard questions about the constitutionality, as well as the wisdom, of an increasingly president-centered regulatory state."<sup>8</sup> Scholars have identified other potential implications of polarization for bureaucracy, but here I focus only on the relationship between divided polarization, congressional capacity to legislate, and administrative power.<sup>9</sup>

The notion that divided polarization induces legislative gridlock, which disables congressional oversight of bureaucracy, is quite plausible. It is in some tension with – though does not necessarily contradict – research in political science suggesting that divided government in the postwar United States is *not* clearly associated with lower levels of legislative productivity, and *is* associated with strategic moves by legislators facing ideologically distant presidents to *craft the sub-*

stance of legislation and design its implementation structures to achieve legislative goals in the face of executive opposition. Further insights about the influence of divided polarization on legislative capacity, and thereby on administrative power, may be gained by examining the substance and design of legislation, not just the number of statutes passed.

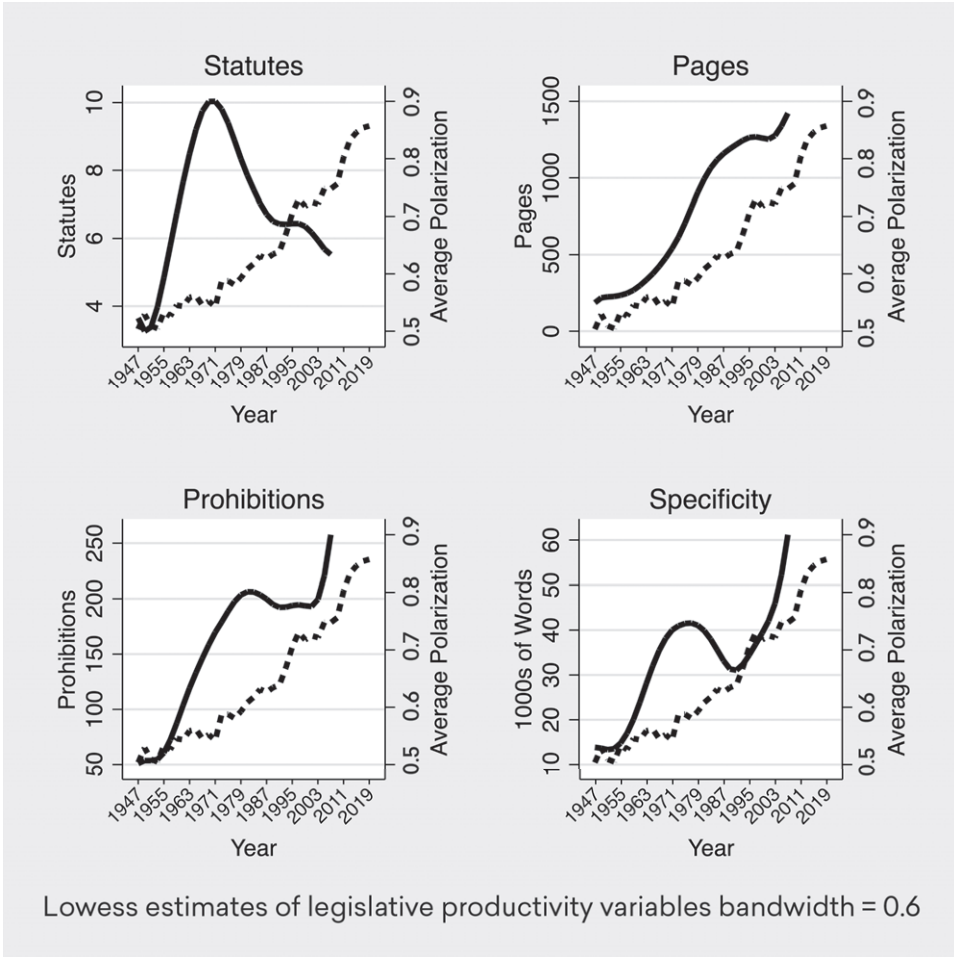
**E**mpirically speaking, legislative productivity is generally measured by political scientists as a function of the number of statutes passed per Congress in combination with some measure of the laws' significance.<sup>10</sup> The body of laws identified in political scientist David Mayhew's landmark study of divided government in the postwar United States has been especially influential and extensively studied in scholarship on congressional behavior. Mayhew's key finding was that, contrary to widely held expectations, divided government was not associated with the number of significant laws passed per Congress. Some later work confirmed this result, and some contradicted it using different methods or measures.<sup>11</sup> It seems fair to conclude from this body of work that we cannot confidently characterize Congress as less productive under divided government.

McCarty evaluates the relationship between party polarization and the number of significant laws passed per Congress and finds a negative association: more polarized Congresses are less productive.<sup>12</sup> Congress scholar Sarah Binder finds that, among issues on the legislative agenda, more polarized Congresses resolve fewer of them by legislation.<sup>13</sup> Such work is the principal empirical evidence cited for the proposition that more polarized Congresses are less productive.

In the area of civil regulation, I find the relationship between legislative productivity and our era of divided polarization to be more complex. The longitudinal picture presented below is based on statutes passed from 1947 to 2008 that were identified by Mayhew as significant and that contained any regulatory commands, defined as any mandatory proscription of actions that the legislation seeks to prevent or any mandatory requirement that the regulated population engage in specified conduct.<sup>14</sup> This conception of civil regulation includes such policy areas as civil rights, consumer protection, environmental, labor, intellectual property, banking, antitrust, and securities regulation.

The upper-left quadrant of Figure 2 shows polarization (dotted line) alongside the number of significant regulatory statutes passed per Congress. After around 1970, as polarization grew, significant legislative enactments of regulatory laws declined materially. This is consistent with the empirical findings of McCarty and Binder, and the conventional wisdom that polarization in an era of divided government begets legislative gridlock and inaction. Passed legislation is one important and reasonable measure of legislative productivity, but others warrant consideration as well. I look at three measures that focus on the content rather than the number of laws.

Figure 2  
 Polarization (Dotted Line) Plotted against Number of Statutes,  
 Pages, Prohibitions, and Level of Specificity



Note: I have discussed the data in greater detail in Sean Farhang, “Legislating for Litigation: Delegation, Public Policy, and Democracy,” *California Law Review* 106 (2018): 1529–1614.

The first is crude but suggestive. The upper-right quadrant of Figure 2 shows the estimated number of pages (in the *Statutes at Large*) in the significant regulatory laws enacted per Congress. By this measure, legislative productivity has grown consistently, moving upward in striking tandem with polarization. It is natural to wonder, though, what content is actually contained in those pages. Perhaps po-



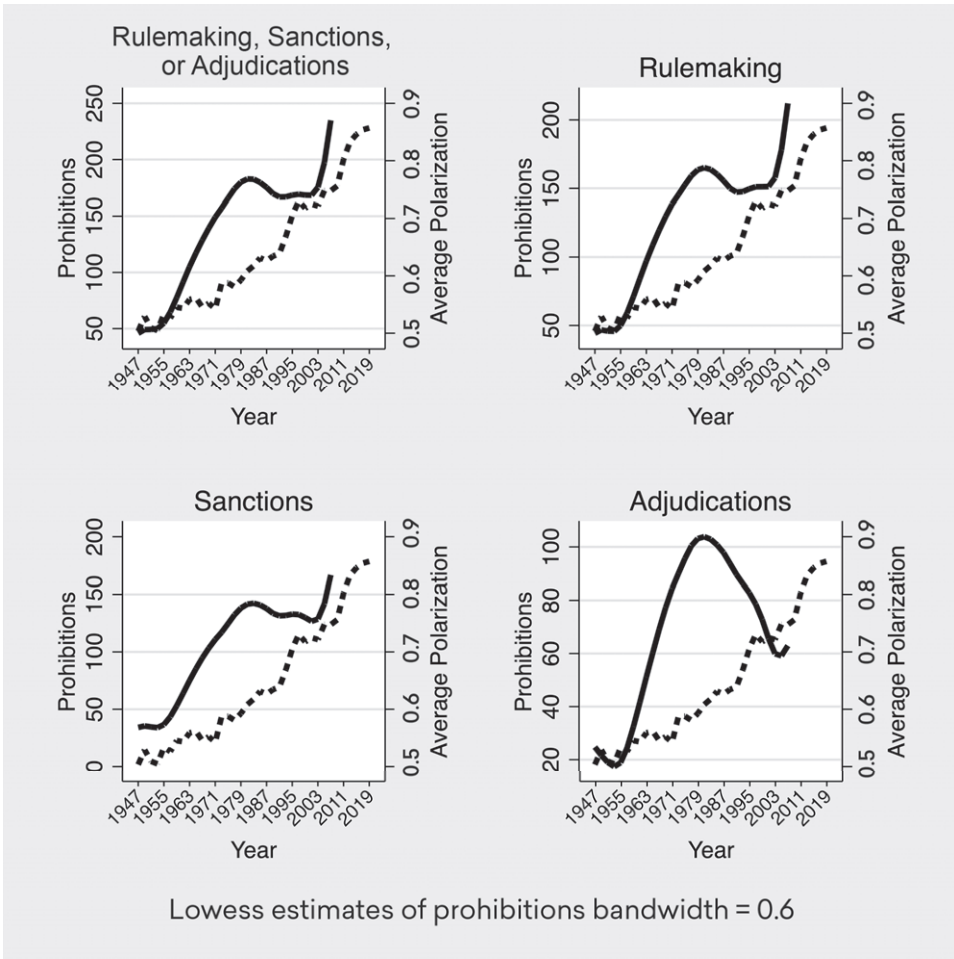
larization's effect on the legislative process generates longer bills without correspondingly greater regulatory substance.

A second approach to legislative content focuses on actual regulatory commands issued by Congress. In the larger project from which the data are drawn, coders read each law and counted each separate regulatory command, producing a variable measuring the sum of discrete requirements and prohibitions imposed on regulated entities.<sup>15</sup> The estimated number of such regulatory commands enacted in each Congress is shown in the bottom-left quadrant of Figure 2. By this measure, we again see long-run growth in productivity in parallel with growing polarization.

A third approach focuses on the degree of specificity of regulatory content. In the larger project from which the data are drawn, coders read each law and created a word count measuring the degree of specificity of the regulatory commands.<sup>16</sup> The specificity variable is constructed as a word count with respect to *only the portions of each statute that lay out the substantive regulatory policy specifying what conduct is prohibited or mandated.*<sup>17</sup> An illustration: The Fair Labor Standards Act Amendments of 1949 include a regulatory command that employees be paid overtime in an amount not less than one-and-one-half times their "regular rate." This command occupies only six lines of the statute. Immediately following it, Congress provided an elaborate definition of "regular rate," as well as extensive exemptions to coverage. The definition and exemptions occupied an additional 144 lines.<sup>18</sup> The specificity measure registers important differences between a spare command and one with extensive elaboration. Congress resolved more policy substance with the command, definition, and exemptions (150 lines) than it would have with the command alone (six lines). The estimated total volume of words captured by this specificity measure in each Congress is pictured in the bottom-right quadrant of Figure 2. By this measure, we again see long-run growth in productivity in parallel with growing polarization.

How does this growth relate to administrative power? Congress may regulate without agencies by empowering litigants and courts rather than agencies as the implementation vehicle for regulatory commands (discussed below). However, Congress in fact relied primarily on agencies to implement the growing volume of regulatory policy. When coders identified each separate regulatory command, they also identified whether agencies were delegated authority to make substantive rules, impose sanctions, or hold administrative adjudications to implement the command.<sup>19</sup> At least one of these three forms of regulatory power governed 88 percent of the regulatory commands. Figure 3 depicts party polarization (dotted line) alongside the estimated number of regulatory commands enacted per Congress that were governed by any of the three forms of administrative power, and separately displays the estimated number governed by substantive rulemaking, administrative sanctions, and administrative adjudications. When all three

Figure 3  
 Polarization (Dotted Line) Plotted against Volume of Delegations Governed by Administrative Rulemaking, Sanctions, and Adjudications



types were aggregated, administrative power to implement the regulatory commands grew steeply; the same is true with respect to rulemaking and administrative sanctions. The exception is administrative adjudications, which grew steeply starting in the mid-1950s, peaked around 1980, and declined thereafter.

From 1969 to 2008, the estimated number of significant regulatory commands enacted per Congress grew from 159 to 258, and the number of words specifying substantive regulatory policy and the total number of pages grew by even wider

margins. Along with the number of significant statutes passed, the *volume of substantive regulatory law* is another (partial) measure of legislative capacity in the domain of regulation. From about 1970 through 2008, during which time polarization increased consistently, Congress passed an increasing volume of regulatory commands that it entrusted to agencies for implementation.

Legislative productivity is a complicated concept. These data suggest that, over time, Congress packed more substantive regulatory policy into fewer statutes. It was less productive in some ways, and more productive in others. The literature on the effect of polarization on legislative productivity and oversight, and by direct extension the effect of polarization on administrative power, would be served by a more systematic theoretical and empirical grasp of the meaning of these multiple dimensions of legislative productivity.

Understanding how divided polarization has shaped administrative power requires that we consider the *character* of delegations to agencies as well as their number. Congressional oversight of agencies can take many forms. A large political science literature emphasizes that one form is for Congress to anticipate the threat of executive subversion prior to passage and diminish the need for active post-enactment oversight by resolving more substantive policy issues in the statute, and by including in the statute procedural rules intended to constrain presidential influence, limit bureaucratic discretion, and stack the deck in favor of the enacting coalition.<sup>20</sup> If divided government in general is associated with greater antagonism between Congress and the president, and this affects how Congress fashions administrative power, then growing polarization will heighten that antagonism and the corresponding effects.

Political scientists John Huber and Charles Shipan, studying state legislatures, found that divided government leads to *more detailed* laws, with detail measured by a law's word count.<sup>21</sup> Facing an opposing executive, the legislature has greater incentives to nail down policy in more detail in the statute, increasing the chances that its preferences will be implemented. Political scientists David Epstein and Sharyn O'Halloran found that divided government leads Congress to delegate *less discretion* to the bureaucracy, with lower degrees of discretion measured by higher levels of formal structural constraints on administrative action, such as time limits for taking actions, reporting and consultation requirements, and limits on the amount of money that can be allocated to an activity.<sup>22</sup> Political scientist David Lewis finds that when creating new agencies under divided government, Congress is more likely to *structurally insulate* the agency from presidential influence through mechanisms such as imposing qualifications on who the president can appoint, fixing the duration of their service, and placing agencies at a greater remove from presidential control (for instance, outside the cabinet).<sup>23</sup> Together, this literature demonstrates that divergence of legislative and executive prefer-

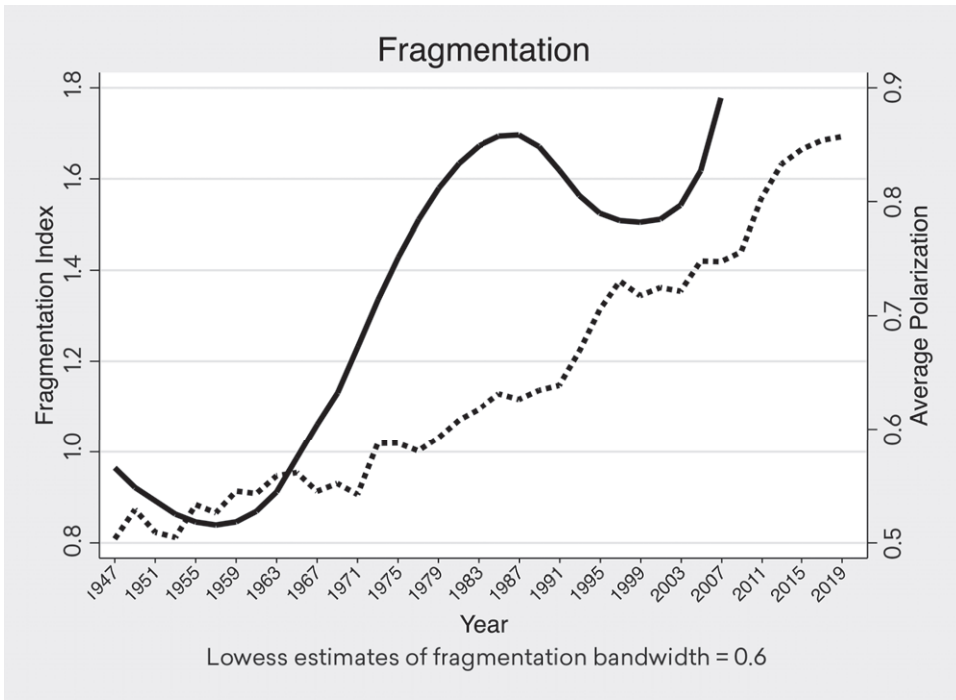
ences – a hallmark of divided polarization – is associated with delegations to bureaucracy that are characterized by *increasing levels of constraint* placed on the exercise of administrative power.

A related and recently growing literature focuses on how Congress can constrain bureaucracy by fragmenting implementation.<sup>24</sup> The literature has identified at least three dimensions of fragmentation. First, more fragmented policy implementation designs rely upon a *larger number of distinct actors and entities* to carry the law into effect, such as boards, commissions, secretaries, separate administrative officers, judges, and litigants. Second, power can be fragmented by dividing it over multiple *distinctive sources of institutional authority*, each of which has a significant measure of autonomy and independence, such as by distributing implementation power across separate administrative agencies. Third, power can be fragmented by empowering multiple actors and/or agencies to perform *the same functions with respect to the same statutory provisions*, creating overlapping jurisdictions.<sup>25</sup> Drawing these threads together, a design is highly fragmented if it relies upon many actors and numerous agencies, and contains frequent episodes of overlapping jurisdiction.

Under divided polarization, fragmentation of an implementation framework can serve the legislative goal of constraining executive influence on implementers to subvert the preferences of the enacting coalition. This is, in part, because increasing the number of actors and agencies that must be coordinated to accomplish decisive action can, on balance, make significant departures from the policy status quo more difficult. It creates coordination challenges and a system of checks and balances that will limit presidential influence on implementation of the policy in question.<sup>26</sup>

Political scientist Miranda Yaver and I tested this theory with the significant regulatory legislation data discussed in the last section. In his classic work on American bureaucracy, James Q. Wilson characterizes American policy implementation as a “barroom brawl” with “many participants” and “no referee.”<sup>27</sup> Yaver and I developed a measure of fragmentation in policy implementation to measure the extent of that brawl. The measure is a composite index based upon the number of 1) each discrete named actor/entity in each law that was empowered to execute the core regulatory functions; 2) different federal agencies delegated some authority to implement a core regulatory function in the law; and 3) instances that multiple administrative or judicial actors were simultaneously given the authority to perform the *same* regulatory implementation function in order to implement the *same* provisions of a law. Figure 4 shows the estimated values of our fragmentation index, measured in each law, over time. Over the long run, fragmentation grew steeply alongside polarization. We found in empirical models with controls that divided party government is clearly associated with fragmentation in policy implementation.<sup>28</sup>

Figure 4  
Polarization (Dotted Line) Plotted against Fragmentation  
in Administrative Implementation Design



Source : Sean Farhang and Miranda Yaver, “Divided Government and the Fragmentation of American Law,” *American Journal of Political Science* 60 (2) (2016): 401–417.

In the era of divided polarization, as Congress has produced an increasing volume of regulatory law and assigned it to agencies for implementation, the corresponding administrative power to carry the law into effect has been more encumbered by constraints on bureaucratic power and has been increasingly fragmented. Bureaucracy scholars disagree about the actual policy effects of these developments.<sup>29</sup> The net policy effects of extensive constraints on and fragmentation of administrative power are difficult to assess (probably intractably so), and I do not engage that question here.

Whatever the policy effects, this empirical work on constraints and fragmentation in the era of divided polarization is in tension with the notion that congressional incapacitation by polarization has freed administrative power from the reins of legislative influence. Constraints and fragmentation are legislative means

to control administrative power. They increase under conditions of legislative-executive conflict, a key feature of the era of divided polarization. Fragmentation is a strategy of legislative control of bureaucracy that grew at the same time that the number of enacted significant statutes declined. Like measures of the volume of regulatory substance discussed above, the temporal patterns of constraints and fragmentation underscore how grasping legislative influence on bureaucracy (or its absence) in our era of divided polarization can be furthered by evaluating the content of legislation as well as the number of statutes passed.

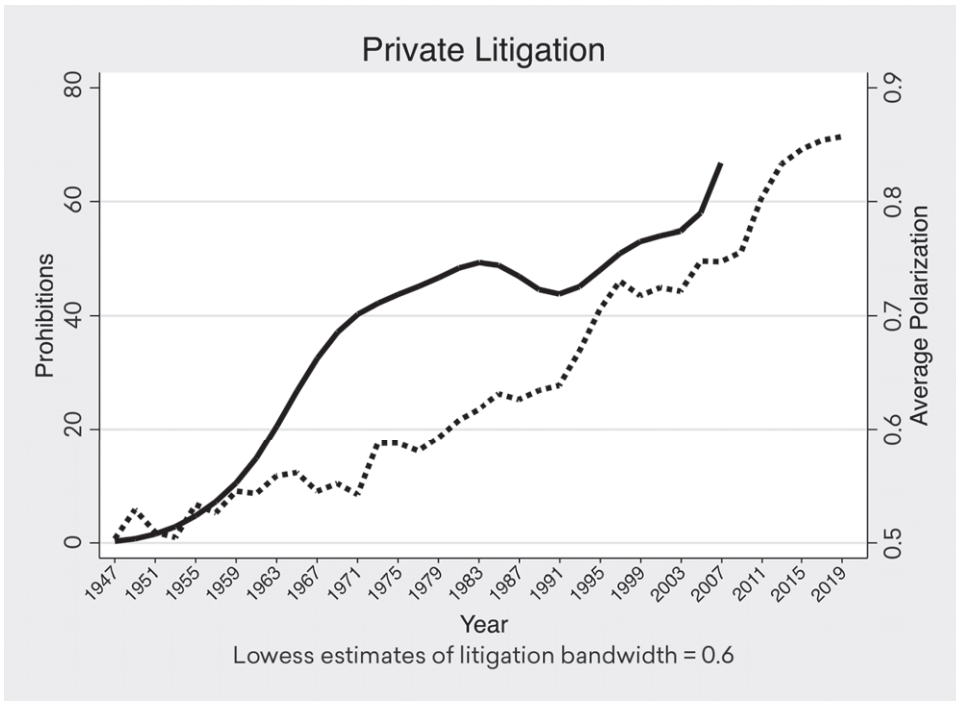
**I**n our era of divided polarization, when the congressional majority faces an ideologically distant president, it also increases incentives for Congress to leverage private lawsuits to enforce its regulatory commands in court. Congress can do so by including express private rights of action in statutes and by incentivizing suits with statutory provision for attorney fee awards and economic damages for winning plaintiffs. When Congress distrusts bureaucracy because of a distant president's influence, this correspondingly makes alternative or supplementary means of implementing statutory mandates more attractive. Private lawsuits are the chief alternative or supplement to bureaucracy for enforcing statutory mandates. Presidents have far less influence on private litigants and institutionally independent federal courts than on the bureaucracy. Private enforcement is thus a form of insurance against the president's failure to use the bureaucracy to carry out Congress's will.<sup>30</sup>

Since the late 1960s, in the era of divided polarization, private enforcement has become an increasingly significant facet of the American regulatory state, and Congress has increasingly taken recourse to this form of insurance.<sup>31</sup> Turning again to the significant regulatory legislation data, Figure 5 reflects the estimated number of regulatory commands governed by a private right of action over time.<sup>32</sup> Over the long run, it grew steeply alongside polarization. By the last three Congresses available in the data (2003–2008), 30 percent of the commands were governed by a private right of action. As with enactment of constraints and the fragmentation of implementation, divided government and Congress's ideological distance from the president were powerfully associated with increasing congressional reliance on private enforcement.<sup>33</sup>

I referred to private lawsuits as an alternative or supplement to bureaucracy. As a descriptive empirical matter, Congress has overwhelmingly deployed private enforcement as a supplement (rather than as an alternative) to administrative power. When Congress has used a private right of action to enforce some regulatory commands, 87 percent of the time it simultaneously included administrative rulemaking, administrative adjudication, and/or administrative sanctions to implement the *same commands*.<sup>34</sup> Growing legislative provision for private lawsuits in federal policy implementation does not correspond to a diminution in formally



Figure 5  
Polarization (Dotted Line) Plotted Against Private Rights of Action



Source: Sean Farhang, “Legislating for Litigation: Delegation, Public Policy, and Democracy,” *California Law Review* 106 (2018): 1529–1614.

delegated administrative power, but rather changes the context and environment in which that power is wielded. When one focuses on legislative agendas rather than passed legislation, the last decade presents an interesting shift in partisan taste for private lawsuits to implement legislation. It has long been conventional wisdom in American politics and law that Democrats are far more likely than Republicans to favor access to courts to enforce individual rights with lawsuits. In collaborative work, legal scholar Stephen Burbank and I show that this conventional wisdom, long true, no longer reflects party agendas in Congress. We report the results of an empirical examination of bills containing private rights of action with pro-plaintiff fee-shifting provisions that were introduced in Congress from 1989 through 2018. The last eight years of our data document escalating Republican Party support for proposals to create individual rights enforceable by private lawsuits, mobilized with attorney’s fee awards. By 2015–2018, there was rough

parity in levels of support for such bills by Democratic and Republican members of Congress.<sup>35</sup>

This transformation was driven substantially by growing Republican support for private enforcement in bills that were anti-abortion, -immigrant, and -taxes, and pro-gun and -religion. We demonstrate that this surge in Republican support for private lawsuits to implement rights was led by the increasingly conservative wing of the Republican Party, fueled in part by an apparent belief during the Obama years that the president could not be relied upon to implement their anti-abortion, -immigrant, and -taxes, and pro-gun and -religion agendas. We conclude that the contemporary Republican Party's position on civil lawsuits has become bifurcated, reflecting the distinctive preferences of core elements of their coalition. They are the party far more likely to oppose private enforcement when deployed to enforce business regulation, while embracing it when deployed in the service of rights for their social conservative base.<sup>36</sup>

**T**he relationship between agency powers and private enforcement is complex. As noted, in the significant regulatory legislation data, 87 percent of the time that Congress deploys a private right of action with respect to some commands, they are also governed by at least one of the fundamental forms of administrative power: rulemaking, adjudication, or sanctioning authority. When the private suits are adequately incentivized, the volume of litigation in some policy domains can become a dominant part of the policy landscape, dwarfing agency enforcement activity by comparison. In the past decade, there were about 1.7 million lawsuits in federal courts filed by private parties to enforce federal statutes, spanning areas such as antitrust, banking, voting rights, employment discrimination, police brutality, labor, environmental, consumer protection, intellectual property, and securities regulation, among many others.<sup>37</sup>

The effect of private suits on agency power in hybrid regimes is contextual and depends on the agency's preferences and agenda. It is useful to distinguish between administrative power to create or elaborate legal rules and power to enforce legal rules. Under private enforcement regimes, agencies share enforcement powers with private plaintiffs and their attorneys. From the standpoint of an agency seeking to control or limit enforcement (for example, under more deregulatory leadership), private enforcement can diminish agency power. Agency actions to withdraw or diminish enforcement pressure will be less consequential, or even inconsequential, if private enforcement readily picks up any slack left in the wake of agency inaction.<sup>38</sup> This weakens the hand of deregulatory or antiregulatory presidents or agency leadership. On the other hand, private enforcement may advance an agency agenda of robust enforcement when the agency lacks the resources or political capacity to execute it directly.<sup>39</sup> Thus, on the enforcement dimension, private enforcement's influence on agency power is asymmetric. It is more likely

to weaken agencies with a deregulatory and antiregulatory stance and to strengthen those with a more activist regulatory stance.

Shifting the focus from rule enforcement to rule creation and elaboration, the increasing role of private lawsuits intermingled with administrative power in the era of divided polarization leads bureaucracy to share more of the lawmaking field with courts. Even in the absence of private rights of action, courts will participate in elaborating statutory meaning under judicial review of agency actions. However, private enforcement regimes make litigation and courts part of the front-line implementation infrastructure, and often make courts interpreters of first instance as opposed to reviewers of agency interpretations. This can exponentially multiply courts' role in elaborating statutory meaning. Each of the 1.7 million private lawsuits filed in the past decade to enforce federal statutes was an opportunity for federal courts to interpret the federal statutes in question.

Recent research has identified an additional implication of growing private enforcement for administrative power. Legislative coalitions, which include policy experts and sophisticated interest groups, recognize potential problems associated with tilting the balance of power toward greater statutory elaboration by courts. One is that federal judges have far less policy expertise than agencies. Another is that, post-enactment, life-tenured and institutionally independent federal judges are far harder for Congress to influence than bureaucrats. That is, post-enactment oversight, short of passing new legislation, is far more difficult with respect to courts. As a result, there are strong theoretical grounds to expect that when Congress relies upon private enforcement, it will resolve more regulatory policy substance in Congress and delegate less lawmaking power to implementers.<sup>40</sup> In an empirical analysis of the significant regulatory legislation data, I find this to be the case. With extensive control variables in the models, I find that when relying on private enforcement, Congress devotes much more attention and effort to developing policy substance in hearings on the bill and specifies substantive regulatory policy in substantially more detail.<sup>41</sup>

Increasing legislative reliance on private enforcement as a strategy to effectuate congressional commands in the era of divided polarization and the corresponding elevation of Congress's role in making substantive regulatory policy are in tension with the notion that congressional incapacitation by polarization has freed administrative power from the reigns of legislative influence. The rise of private enforcement under divided polarization was a strategic legislative choice to supplement or (sometimes) evade administrative power. By determining policy substance in more detail in statutes with private enforcement regimes, a large majority of which included administrative implementation powers as well, Congress left administrators less power to go their own way. Further, this regulatory strategy grew at the same time that the number of enacted significant regulatory statutes declined. Like measures of the volume of regulatory substance in statutes and

temporal patterns of constraints upon and fragmentation of administrative power, these results highlight that the study of legislative influence on bureaucracy (or its absence) can be advanced by evaluating the content as well as the number of statutes passed.

A repeated claim in the literature on polarization is that legislative paralysis so damages congressional oversight of the administrative state as to seriously threaten its constitutional legitimacy and democratic accountability. This contention rests, in part, on empirical findings about a negative relationship between party polarization and congressional productivity, generally based on longitudinal empirical studies of the number of laws passed by postwar Congresses or the number of issues on the legislative agenda addressed by such laws. This work is persuasive and important, but it paints an incomplete picture. By focusing on the content of the laws passed, this essay shows that in the era of divided polarization, Congress has actually enacted an ever-growing volume of significant regulatory policy – packaged into fewer laws – increasingly employed implementation designs intended to limit bureaucratic and presidential subversion of legislative preferences, and legislated regulatory policy substance in greater detail when relying on litigation and courts as a supplement or alternative to bureaucracy.

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#### ABOUT THE AUTHOR

Sean Farhang is the Elizabeth Josselyn Boalt Professor of Law and Professor of Political Science and Public Policy at the University of California, Berkeley. He is the author of *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (2010) and *Rights and Retrenchment: The Counterrevolution against Federal Litigation* (2017).

#### ENDNOTES

- <sup>1</sup> The scope of the literature is reflected in Paul Pierson and Eric Schickler, “Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization,” *Annual Review of Political Science* 23 (1) (2020): 37–58; Nolan McCarty, *Polarization: What Everyone Needs to Know* (Oxford: Oxford University Press, 2019); John Sides and Daniel Hopkins, eds., *Political Polarization in American Politics* (New York: Bloomsbury Publishing, 2015); Frances Lee, “How Party Polarization Affects Governance,” *Annual Review of Political Science* 18 (1) (2015): 261–282; Nathaniel Persily, ed., *Solutions to Political Polarization in America* (Cambridge: Cambridge University Press, 2015); and Geoffrey Layman, Thomas Carsey, and Juliana Menasce Horowitz, “Party Polarization in American Politics: Characteristics, Causes, and Consequences,” *Annual Review of Political Science* 9 (1) (2006): 83–110.

- <sup>2</sup> Lee, “How Party Polarization Affects Governance,” 263.
- <sup>3</sup> Cynthia Farina, “Congressional Polarization: Terminal Constitutional Dysfunction?” *Columbia Law Review* 115 (7) (2015): 1689–1738, 1690–1701; Sarah Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, D.C.: Brookings Institution Press, 2004); Nolan McCarty, “The Policy Effects of Political Polarization,” in *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, ed. Paul Pierson and Theda Skocpol (Princeton, N.J.: Princeton University Press, 2007): 223–255, 247–251; and Edward Carmines and Matthew Fowler, “The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power,” *Indiana Journal of Global Legal Studies* 24 (2) (2017): 369–398, 378–379.
- <sup>4</sup> McCarty, *Polarization*, 141; McCarty, “The Policy Effects of Political Polarization,” 136–137; Carmines and Fowler, “The Temptation of Executive Authority,” 378–379; Layman et al., “Party Polarization in American Politics,” 100–101; and William Hicks, “Partisan Competition and the Efficiency of Lawmaking in American State Legislatures, 1991–2009,” *American Politics Research* 43 (5) (2015): 743–770.
- <sup>5</sup> These are legislator “ideal points” on a left-right scale, first developed by Keith Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (Oxford: Oxford University Press, 2000).
- <sup>6</sup> McCarty, *Polarization*, 247; Gillian Metzger, “Agencies, Polarization, and the States,” *Columbia Law Review* 115 (7) (2015): 1739–1787, 1744, 1748–1749; Farina, “Congressional Polarization,” 1690–1691, 1736; David Spence, “The Effects of Partisan Polarization on the Bureaucracy,” in *Can America Govern Itself?* ed. Francis Lee and Nolan McCarty (Cambridge: Cambridge University Press, 2019): 271–300, 277–279; and Carmines and Fowler, “The Temptation of Executive Authority,” 384–395. While embracing conventional wisdom that polarization and divided government frustrate congressional oversight through new substantive legislation, Metzger considers other indirect legislative levers of control, such as delays in appropriations and appointment confirmations (in “Agencies, Polarization, and the States,” 1749–1751). In arguing that legislative gridlock enlarges administrative power, Spence doubts whether it also enlarges presidential power (in “The Effects of Partisan Polarization on the Bureaucracy,” 279–280).
- <sup>7</sup> Michael Barber and Nolan McCarty, “Causes and Consequences of Polarization,” in *Solutions to Political Polarization in America*, ed. Nathaniel Persily (Cambridge: Cambridge University Press, 2015), 50.
- <sup>8</sup> Farina, “Congressional Polarization,” 1691–1692. See also Metzger, “Agencies, Polarization, and the States,” 1744; and Carmines and Fowler, “The Temptation of Executive Authority.”
- <sup>9</sup> They are summarized by McCarty, *Polarization*, 141–142; and Spence, “The Effects of Partisan Polarization on the Bureaucracy.”
- <sup>10</sup> David Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–2002* (New Haven, Conn.: Yale University Press, 1991); William Howell, Scott Adler, Charles Cameron, and Charles Riemann, “Divided Government and the Legislative Productivity of Congress, 1945–1994,” *Legislative Studies Quarterly* 25 (2) (2000): 285–312; and Joshua Clinton and John Lapinski, “Measuring Legislative Accomplishment, 1877–1994,” *American Journal of Political Science* 50 (1) (2006): 232–249.

- <sup>11</sup> Morris P. Fiorina, *Divided Government* (Boston: Allyn and Bacon, 1996) and David Brady and Craig Volden, *Revolving Gridlock: Politics and Policy from Jimmy Carter to George W. Bush* (Boulder, Colo.: Westview Press, 2006) reach similar conclusions as Mayhew. Howell et al., “Divided Government and the Legislative Productivity of Congress,” find that Congress is not less productive under divided government when all “important” law is considered, but it enacts fewer “landmark” laws. In *Stalemate*, Binder measures productivity as the fraction of salient issues on the legislative agenda that are resolved by legislation, where legislative agenda items are identified by unsigned editorials in *The New York Times* (whose editorial coverage is a denominator). She finds this measure to be negatively associated with divided government. However, as others have suggested, *New York Times* editorial content may be endogenous to legislative characteristics (like divided government and party polarization), limiting our ability to make clear inferences from it regarding legislative productivity. Fang-Yi Chiou and Lawrence S. Rothenberg, “Comparing Legislators and Legislatures: The Dynamics of Legislative Gridlock Reconsidered,” *Political Analysis* 16 (2) (2007): 197–212; Clinton and Lapinski, “Measuring Legislative Accomplishment,” 245; and Pierson and Schickler, “Madison’s Constitution Under Stress” (discussing the relationship between media reporting and polarization).
- <sup>12</sup> McCarty, *Polarization*, 140.
- <sup>13</sup> Binder, *Stalemate*; and Sarah Binder, “The Dysfunctional Congress,” *Annual Review of Political Science* 18 (1) (2015): 85–101. See note 11 above for further discussion of Binder’s measure of legislative productivity and its potential limits.
- <sup>14</sup> This captured 217 of the 366 laws identified as significant by Mayhew during this period. The data are described in more detail in Sean Farhang and Miranda Yaver, “Divided Government and the Fragmentation of American Law,” *American Journal of Political Science* 60 (2) (2016): 401–417; and Sean Farhang, “Legislating for Litigation: Delegation, Public Policy, and Democracy,” *California Law Review* 106 (2018): 1529–1614.
- <sup>15</sup> The coding of this variable is described in further detail in Farhang, “Legislating for Litigation,” 1584, 1605.
- <sup>16</sup> Word counts are the most common strategy for measuring statutory specificity. See Robert D. Cooter and Tom Ginsburg, “Comparative Judicial Discretion: An Empirical Test of Economic Models,” *International Review of Law and Economics* 16 (3) (1996): 295–313; John Huber and Charles Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002); and Tom Ginsburg, “Constitutional Specificity, Unwritten Understandings and Constitutional Agreement,” in *Constitutional Topography: Values and Constitutions*, ed. András Sajó and Renáta Uitz (Den Haag, Netherlands: Eleven International Publishers, 2010).
- <sup>17</sup> Farhang, “Legislating for Litigation” 1589–1592, 1604–1605.
- <sup>18</sup> Fair Labor Standards Act Amendments of 1949, 63 Stat. 910, 912–915 (1949).
- <sup>19</sup> Farhang, “Legislating for Litigation” 1577–1578.
- <sup>20</sup> David Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997* (Stanford, Calif.: Stanford University Press, 2004); John D. Huber and Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002); David Epstein and Sharyn O’Halloran, *Delegating Powers: A Transaction Costs Politics Approach to Politics Under the Separation of Powers* (Cambridge: Cambridge University Press, 1999); and Terry



- Moe, "The Politics of Bureaucratic Structure," in *Can the Government Govern?* ed. John E. Chubb and Paul E. Peterson (Washington, D.C.: The Brookings Institution Press, 1989).
- <sup>21</sup> Huber and Shipan, *Deliberate Discretion?*
- <sup>22</sup> Epstein and O'Halloran, *Delegating Powers.*
- <sup>23</sup> Lewis, *Presidents and the Politics of Agency Design.*
- <sup>24</sup> Mona Wakilifathi, "Strategic Delegation? How Legislative Political Elites Respond to Electoral Uncertainty," *Legislative Studies Quarterly* (2020); Stephanie Bornstein, "Public-Private Co-Enforcement Litigation," *Minnesota Law Review* 104 (2019): 811–888; Farhang and Yaver, "Divided Government and the Fragmentation of American Law"; Jody Freeman and Jim Rossi, "Agency Coordination in Shared Regulatory Space," *Harvard Law Review* 125 (5) (2012): 1131–1211; and Jacob Gersen, "Overlapping and Underlapping Jurisdiction in Administrative Law," *The Supreme Court Review* 1 (2006): 201–247.
- <sup>25</sup> *Ibid.*
- <sup>26</sup> Farhang and Yaver, "Divided Government and the Fragmentation of American Law"; Freeman and Rossi, "Agency Coordination in Shared Regulatory Space"; and Gersen, "Overlapping and Underlapping Jurisdiction in Administrative Law."
- <sup>27</sup> James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), 297–301.
- <sup>28</sup> Farhang and Yaver, "Divided Government and the Fragmentation of American Law."
- <sup>29</sup> Some of the policy debate is summarized in *ibid.*, 402–403.
- <sup>30</sup> Farhang, *The Litigation State*; Thomas Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (Berkeley: University of California Press, 2002); Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass.: Harvard University Press, 2019); and R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: Brookings Institution Press, 1994).
- <sup>31</sup> Farhang, *The Litigation State.*
- <sup>32</sup> Farhang, "Legislating for Litigation," 1564.
- <sup>33</sup> Sean Farhang, "Public Regulation and Private Lawsuits in the American Separation of Powers System," *American Journal of Political Science* 52 (4) (2008): 821–839; Sean Farhang, "Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law," *Law and Social Inquiry* 37 (3) (2012) 657–685; and Stephen B. Burbank and Sean Farhang, "A New (Republican) Litigation State?" *UC Irvine Law Review* 111 (2021): 657–691.
- <sup>34</sup> Farhang, "Legislating for Litigation," 1564.
- <sup>35</sup> Burbank and Farhang, "A New (Republican) Litigation State?"
- <sup>36</sup> *Ibid.*
- <sup>37</sup> Judicial Business of the United States Courts, "Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2009 and 2010," [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/Co2Sep10.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/Co2Sep10.pdf).
- <sup>38</sup> Farhang, *The Litigation State*; and David Freeman Engstrom, "Agencies as Litigation Gatekeepers," *Yale Law Journal* 123 (3) (2013): 616.

<sup>39</sup> Karen Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935 – 1972* (Cambridge: Cambridge University Press, 2016); and Engstrom, “Agencies as Litigation Gatekeepers.”

<sup>40</sup> Farhang, “Legislating for Litigation,” 1549–1572.

<sup>41</sup> *Ibid.*, 1572–1600, 1606–1609. This empirical model uses the specificity measure described on page 54 of this essay. The article also finds that when relying on private enforcement, Congress is more likely to enact *specific* and *mandatory* rulemaking delegations, thereby leveraging more expertise and tilting elaboration of law toward an institution (bureaucracy) over which Congress has more control than it does over Article III judges.

# Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?

*David E. Lewis*

*The U.S. national government's poor pandemic response raises unsettling questions about the overall health of the administrative state: that is, the agencies, people, and processes of the executive branch of the federal government. First, are the administrative weaknesses revealed over the last year symptomatic of widespread problems beyond the public health bureaucracy? Second, are the weaknesses attributable to the Trump administration or do they reveal a deeper malady, something that afflicted earlier Democratic and Republican administrations? In summer 2020, my colleagues and I conducted a survey of thousands of federal executives to help shed light on these questions. These executives reported a low opinion of the then-current administration, the White House, and the president's political appointees. Yet they also reported long-standing issues of low investment and problems of capacity that extend back into other Democratic and Republican administrations. Years of neglect have culminated in vulnerabilities manifesting themselves in increasingly regular and severe administrative failures. These failures put all of us at risk.*

**I**n the summer of 2020, the number of COVID-19 cases in the United States surged past six million and deaths approached two hundred thousand souls. Incalculable human suffering directly related to the virus was compounded by secondary effects of the pandemic on the nation's economy and its social fabric: its schools and volunteer activities, its houses of worship and gatherings of family and friends. Cases and mortality were on the rise again, particularly in the Sunbelt and Midwest. Unhappy citizens complained about delays in testing and lengthy shutdowns. Faced with the largest public health emergency in decades, the United States seemed to lack the capacity to respond. While other countries were celebrating a reprieve, if not recovery, the United States showcased an unsettling breakdown.<sup>1</sup> The nation initially ran short on ventilators.<sup>2</sup> Shortages in personal protective equipment persisted for months.<sup>3</sup> The federal government could provide neither sufficient nor timely tests.<sup>4</sup> A high school student in Seattle was collecting and distributing data on COVID-19 infections more reliably than

the Centers for Disease Control and Prevention (CDC), the ten-thousand-person federal agency responsible for the job.<sup>5</sup> Not only was the administration incapable or unwilling to provide a unified plan for how to respond to the crisis, it cast doubt over whether there was a crisis.<sup>6</sup>

Those commenting on the crisis gave different explanations for the nation's pitiful pandemic response. Some blamed poor presidential leadership.<sup>7</sup> The president's critics charged him with missing clear warning signs, refusing to use in-house government expertise and plans, and undercutting efforts to curtail the virus's spread. At the end of February, 2020, the president stated, "It's going to disappear. One day, it's like a miracle, it will disappear."<sup>8</sup> The president persistently downplayed the threat and proposed "liberating" states like Michigan from what he described as illegitimate stay-at-home orders.<sup>9</sup> He publicly contradicted CDC statements on the severity of the crisis and on appropriate preventative measures like masks and prohibitions on large gatherings. Such actions left governors and mayors with little political cover for tough choices and encouraged resistance to public health actions that would slow the spread of the virus.

For all the criticism of the president, other analysts puzzled over the poor performance by the bureaucracy responsible for the pandemic response. At the heart of complaints about poor bureaucratic performance was the CDC. The president himself criticized the agency for being ill-prepared for the crisis, tweeting, "For decades the @CDCgov looked at, and studied, its testing system, but did nothing about it. It would always be inadequate and slow for a large scale pandemic."<sup>10</sup> *The New York Times* publicly wondered "What Went Wrong?" in the agency whose entire purpose is to combat infectious diseases like COVID-19.<sup>11</sup> A deep dive into the public health bureaucracy revealed organizational chaos and resource problems.<sup>12</sup> Why could it not perform basic tasks like delivering reliable tests, collecting data, or even conveying a consistent message?

Both explanations for the breakdown can be true. The president's choices in the moment prevented an effective national response, while his earlier decision to neglect governance had borne bitter fruit in a demoralized and ultimately broken public health bureaucracy. Critics charged Trump with malign neglect or a purposeful effort to hamstring the administrative state by breaking the bureaucracy.<sup>13</sup> Debates about pandemic response raise more general questions about the overall health of the administrative state: that is, the agencies, people, and processes of the executive branch of the federal government. Do the symptoms manifesting in the public health bureaucracy extend to other parts of the bureaucracy? And are the symptoms attributable to the actions of the Trump administration or do they reveal a deeper malady, something that afflicted earlier Democratic and Republican administrations?

Careful observers inside and outside of government had been raising alarm about the health of the administrative arm of the government well before the

Trump presidency.<sup>14</sup> Since at least the New Deal, the expansion of government activity has been the subject of strong political disagreement between the parties. The administrative state has been caught in a partisan struggle over the proper scope of government activity, a debate that has only sharpened since the early 1980s with the increased polarization of the two main political parties. Conflating the departments and agencies of government with the policies they pursue, many Republican elected officials have sought to limit government activity by unraveling the machinery of government. Moreover, both parties have responded favorably to management fads that feed into negative stereotypes about bureaucracy and have responded accordingly.<sup>15</sup> For neither party is effective agency management – the hard work of government that no one sees – a regular priority.<sup>16</sup>

Debates about the response to the coronavirus pandemic raise the larger question of the robustness of the administrative state in the United States. Government workers keep people safe, provide security and infrastructure for the U.S. financial system, enforce laws, and deliver mail. Their health and readiness are not trifling concerns. If these agencies fail, veterans may die waiting for health care. Poor kids may go hungry. Criminals may go unchecked and people may not be able to vote or get prescriptions on time. Government agencies helped rebuild Europe, win the Cold War, and send astronauts into space. Federal employees invented the Internet.<sup>17</sup> One-quarter of U.S. Nobel Prize winners are federal employees.<sup>18</sup> Partisans can reasonably disagree about what the federal government should do, but it is everyone's job to make sure it is healthy and managed well.

In summer 2020, my colleagues Nolan McCarty, Mark Richardson, and I joined forces with the Partnership for Public Service to survey thousands of appointed and career federal executives to get their perceptions about the health of the administrative state. We asked these individuals about their perceptions of the federal workforce, investments in the public sector, and management.<sup>19</sup> We have asked some of these questions in the past, which provides some historical reference.<sup>20</sup> This time, to provide a public-private sector comparison, we also included some questions that survey researchers ask C-suite private sector executives.<sup>21</sup> The Partnership released the preliminary results in October 2020.<sup>22</sup>

A survey cannot tell us everything we need to know about the capacity of the U.S. administrative state, but these results provide important insight into what is happening inside government agencies. Respondents provided both quantitative and qualitative data that help illuminate current conditions. For example, one respondent wrote, "Thank you so much for doing this. It is vital that the data get used to really rebuild the federal government after how much this administration and its enablers have built on decades of efforts to undermine and destroy the effectiveness of government." Another wrote, "Thank you for doing this survey. It is very important work. I've been concerned about a crumbling infrastructure from within for a long time now." Some respondents were more pointed in their

critique of the current administration (“I am concerned with the Trump Administration’s attempts to politicize the civil service”) or of the civil service (“[My agency] is replete with dedicated socialists. The agency should be reformed to create greater balance between political views”).

We fielded the survey during the extraordinary circumstances of a worldwide pandemic and unusual political contestation, and the answers reflect that. Notably, more than 59 percent of our federal executives reported that their work portfolio changed during the pandemic.<sup>23</sup> For some, the pandemic had a large effect on their work. While 79 percent reported that their agency “has a sense of urgency for getting things done,” fully 41 percent reported that the services their agency provides to the public have suffered during the pandemic. Yet respondents generally reported that the federal government is a good employer in the crisis and 80 percent reported having all the necessary information technology to work effectively from home.

For others, the unusual political environment of their work provided important context for their responses. Some asked explicitly that we take extra care to ensure confidentiality of their responses. Others admitted, “I even hesitate to put this in writing for fear of retaliation.” By contrast, other respondents inferred bias in the survey, complaining, “The very fact that you are choosing to ask these questions only now under the Trump Administration demonstrates again clearly . . . how biased is academia and the media. You are blinded by your ideology.” Relative to earlier surveys, the rawness of the comments, the despair, and the anger is striking. For many, there is an intense pride in their agency and what they do. This animates either a frustration with changes or a defensiveness in assessing agency performance.

The questions on the survey run the gamut from management to politics, from shutdowns to the pandemic. I focus here on questions targeted at assessing the health of the federal workforce and the quality of management. Overall, federal executives reported high levels of satisfaction with their work. They reported some flexibility to innovate, and many reported an environment of trust and the use of data and evidence in their agencies. Others reported problems with trust, declining attention to facts and data, and little investment in future administrative capacity. A large and quickly growing proportion of federal executives reported significant problems in their workforces, putting in danger their ability to implement core tasks. These workforce problems stem from resource problems and lower levels of competence in all types of federal employees.

**A**mong the most important questions in the survey were those about the health of the federal workforce. The responses we received are illuminating, at times reassuring and at others quite concerning. Federal executives reported high levels of satisfaction with their work and their agencies as places to work, particularly during a pandemic. However, they expressed increasing alarm about the capacity of the workforce to carry out core agency missions.



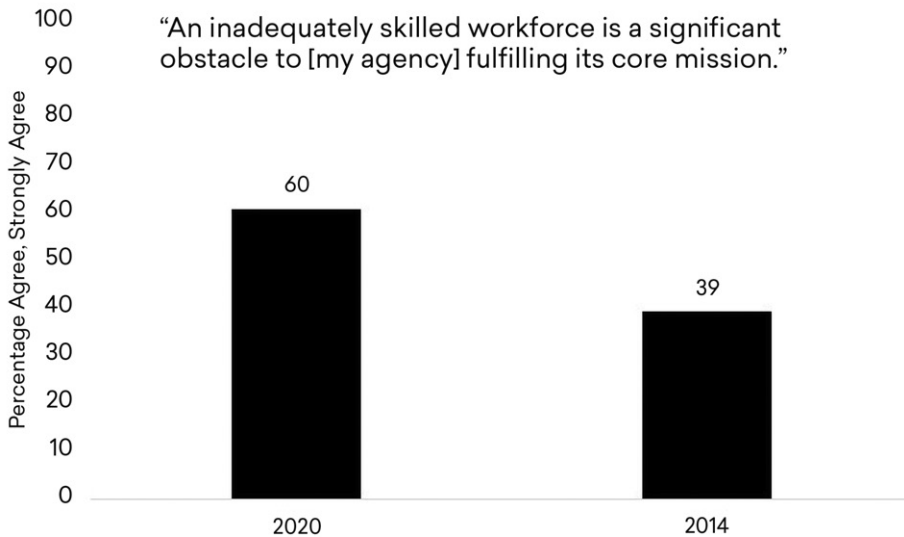
The public sector workforce does not comprise a random sample of U.S. workers. They tend to be older and better educated than workers in the private sector. They also tend to rate higher on what public administration scholars call “public service motivation,” a character trait related to the desire to help people and do good for others.<sup>24</sup> To get selected for an executive position in the federal government means you have to be talented and find some meaning from doing public work, since the pay becomes less competitive the higher you get in public service.<sup>25</sup> We asked federal executives whether they agreed or disagreed with the statement “Considering everything, how satisfied are you with your job?” About 80 percent reported being satisfied or very satisfied in their jobs, and 71 percent said the same about their agency (“Considering everything, how satisfied are you with [your agency]?”).<sup>26</sup>

We probed a bit further, asking specifically about the current context and more general characteristics of their work that might influence satisfaction. We asked executives whether they agreed or disagreed with the statement “The federal government is a good employer during a crisis.”<sup>27</sup> Three-quarters of respondents agreed or strongly agreed with that statement. Respondents were more likely than their private sector counterparts to report that promotions in their organization were based upon a person’s ability (62 percent versus 53 percent) and recommend their agency as a good place to work (79 percent versus 76 percent). They were just as likely to report that their work environment “supports the development of new and innovative ideas” (68 percent versus 66 percent).<sup>28</sup>

These features of public sector work led more than half of our survey participants to report that they are able to recruit and retain the best employees. Fifty-five percent agreed or strongly agreed with the statement “[My agency] is able to recruit the best employees,” and 57 percent confirmed the statement “[My agency] is able to retain its best employees.”<sup>29</sup> Whether one sees it as good news that 25–27 percent of federal managers cannot recruit or retain the best employees is a matter of perspective (the remainder neither agreed nor disagreed). The portion agreeing with these statements is about 10 percentage points higher than in 2014, however.<sup>30</sup> One explanation would relate to changes in federal personnel policy. Another explanation is that the improvement is due to changes in economic conditions. During periods of high unemployment and economic uncertainty, the government becomes a more attractive employer. It is easier to attract new workers and experienced federal employees are less likely to leave because of concerns about retirement income and fewer outside opportunities.

While most federal executives reported satisfaction in their work and agencies, they also reported serious and worsening capacity problems related to the quality and size of the federal workforce. To begin, we asked respondents whether they agreed or disagreed with the statement “An inadequately skilled workforce is a significant obstacle to [my agency] fulfilling its core mission.”<sup>31</sup> As Figure 1 reveals,

Figure 1  
Federal Executive Perception of Decline in Agency Capacity



Source: Survey on the Future of Government Service, 2020, <https://sfgs.princeton.edu>.

60 percent of 2020 respondents agreed or strongly agreed with this statement. Only one-third reported that their workforce was adequate to fulfill its core mission. It is important to note that the question does not ask executives about common tasks across agencies like information processing, contract management, human resources, or legal work. It asks about *core* tasks, those central to the agency's mission. What are these core tasks? They range from providing national defense to delivering the mail to ensuring nondiscrimination in housing to approving patent applications. Across the government, federal executives report problems in the workforce that make fulfilling their core mission difficult.

This number is up from 39 percent in 2014, toward the end of the Obama administration. This is a striking change in responses between the two surveys. In 2014, we remarked that it was a serious concern when close to 40 percent of managers report a problem in their workforces. That number is now 60 percent.

Legal scholars tend to imagine the administrative state as a set of rules and guidance emanating from delegation of authority, but these formal actions have no force without persons to bring them to life, to translate law into policy through the hard work of interpretation and action. Agencies need people to animate law by conducting inspections, filing charges, managing contracts, negotiating agree-

ments, and writing reports. Laws assigning core tasks mean little if there is no robust administrative infrastructure to execute the law.

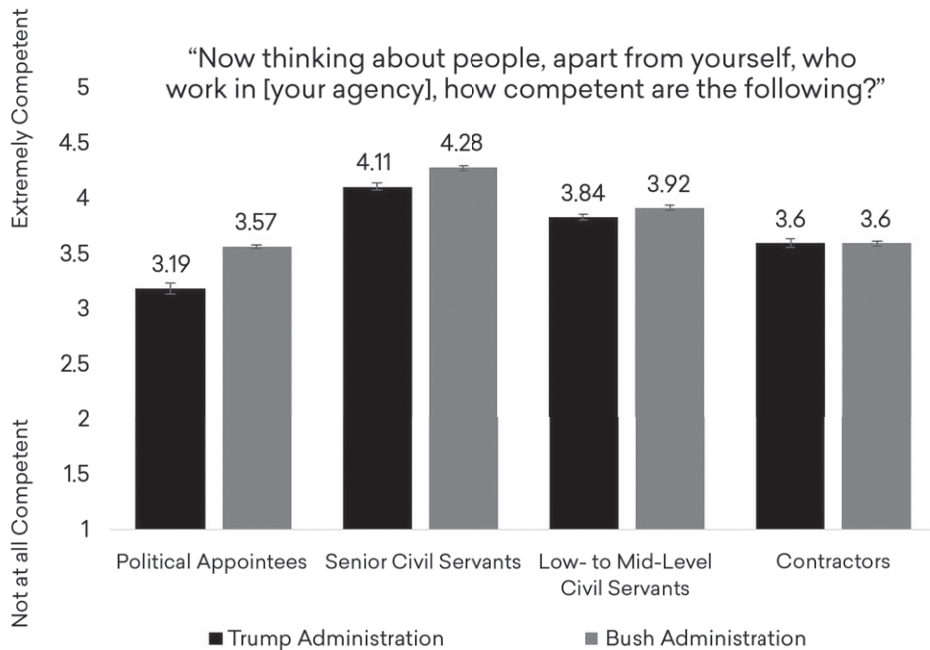
The evident decline in workforce skills between 2014 and 2020 could be due to a number of factors. First, the quality of the people working in federal agencies could be declining. That is, the people working in the agency could be, on average, just of lower ability. For example, agencies could be losing excellent experienced professionals to retirement or work in the private sector. The people who replace them may not be of the same quality. Second, the agency may simply have too few people. It might be the case that agency personnel are very talented but there just aren't enough of them. Third, there may be enough workers, but they might not have the right skills necessary to meet new challenges. For example, agencies may lack expertise to keep up with new developments in areas like information technology, artificial intelligence, data analytics, or contract management.

The survey includes questions that explore all three possibilities. In one set of questions, we asked respondents to evaluate the competence of the people they work with. Specifically, we asked, "Now thinking about people, apart from yourself, who work in [your agency], how competent are the following?" Respondents evaluated political appointees, senior civil servants, low- to mid-level civil servants, and contractors on a scale from one – not at all competent – to five – extremely competent. On scales of this type, we expect the evaluations to be anchored around the middle – three – because we expect that few people are "not at all competent" and "extremely competent" is a high bar.

The average 2020 response, during the Trump administration, is represented in Figure 2 as the black bar. I include responses to the same question in 2007, during George W. Bush's second term, as a comparison (we did not ask this question in 2014). In the far-left column, we see how federal executives rate the Trump administration's political appointees. On a one-to-five scale, the average rating is 3.19, significantly lower than the 3.57 that respondents rated Bush administration appointees in 2007.<sup>32</sup> Respondents report that agency appointee leadership, on average, is middling. Some of the qualitative comments in the survey bolster this. One respondent wrote, "My concern in Department leadership is the lack of attention given to the qualifications of an individual selected for a political appointee position. They have no apparent requirement to understand, document and declare fidelity to agency mission."

Respondents rate the competence of career professionals higher, with those most senior rated as the most competent. The high rating for career professionals might reflect both a higher level of substantive expertise and a respondent bias in favor of agency specialists relative to appointee generalists. Indeed, appointee attention to administration goals over agency recommendations can lead respondents to confuse loyalty to the administration for a lack of competence. A number of qualitative responses suggest frustration with appointees' lack of commitment

Figure 2  
Federal Executive Perception of Agency Competence



Source: Survey on the Future of Government Service, 2007, 2020, <https://sfgs.princeton.edu>; and Paul A. Volcker, Elizabeth L. Colagiuri, Richard N. Haas, et al., *The Changing Nature of Government Service* (Princeton, N.J.: Woodrow Wilson School of Public and International Affairs, Princeton University, 2009).

to the agency’s mission. One writes, “Most of the political appointees come with ideas and often have no regard for the mission of the organization.”

Perhaps more notable in Figure 2, however, is the decline in the evaluation of *all* categories of federal workers: political appointees, senior civil servants, and low- to mid-level civil servants. Respondents rate the average competence of all classes of federal workers lower in 2020 than in 2007. (They rate contract employees about as competent as they were in 2007.) The biggest drop in the perceived competence of the workforce is in the appointee class, but all categories have declined.

Scholars and journalists have carefully documented the effects of the new administration’s approach and policies on departures and retirements among experienced senior civil servants. The rate of departure among career members of the Senior Executive Service was dramatically higher immediately after the 2016 election than after previous party change elections.<sup>33</sup> Others departed because of

frustration after trying to stick it out. Some of those who remained reported low morale and marginalization. One who remained wrote,

Before this administration, our agency had problems that make work less efficient, but it had knowledgeable staff at all levels, people liked the agency and the leadership worked hard because they believed in the mission. The new leadership has “transformed” the organization (illegally in many ways), pushed highly competent people out using RIFs (also illegal), hired inappropriately, and ruined trust between senior leadership and staff.

At least in this agency, choices of agency leadership led to departures and the decline in the competence of the workforce.

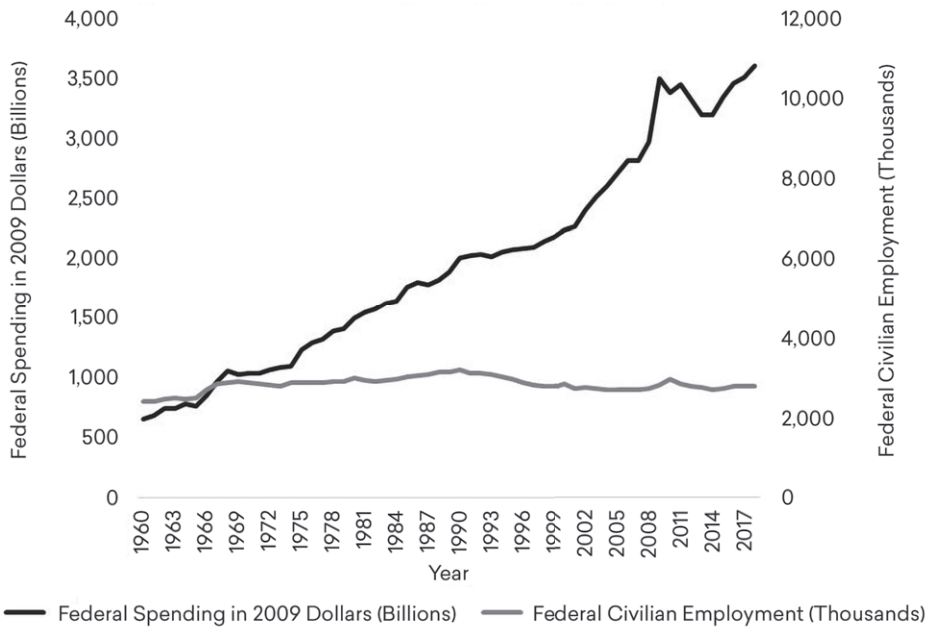
Long-standing difficulties recruiting young people into government service compound the skills problem, as agencies cannot replace departing personnel with promising new hires. Less than 8 percent of the federal workforce is under the age of thirty, half the percentage that is over the age of sixty.<sup>34</sup> Forty-five percent of executives report difficulties in recruitment, many pointing to bureaucratic issues and long-standing problems with how long it takes to hire.<sup>35</sup> One federal executive explained, “The [hiring] system is entirely broken. Executives and managers spend inordinate amounts of time trying to work around the rules of the entrenched Personnel Bureaucracy [*sic*] to successfully recruit qualified applicants. It is exhausting.” Others described the difficulty of recruiting young people to work in government because of bipartisan disparagement of government workers. One respondent is worth quoting at length:

But the previous administration (Obama) was not much better in terms of supporting the federal civil service. Both political parties take pleasure and benefit politically from denigrating “Washington bureaucrats” as over paid [*sic*], out of touch, incompetent, politically biased, and worse. The country believes them. In the court of public opinion no one of importance defends the value of the federal civil service (not talking about military here). So to your questions of whether we can recruit the best talent? First, we can’t hire anyone. Second, potential candidates are actively discouraged from seeking federal employment by the very people who lead two of the three branches of the Federal government.

This helpful elaboration highlights two issues: a recruitment problem (“no one wants to work here”) and a resource problem (“we can’t hire anyone”). One reason for the observed decline in the skill of the workforce may be that people of lower competence are replacing those departing government. Another may be that new hiring is not keeping up with departures or agency demand.

A striking feature of the federal government over the last sixty years has been the great mismatch between the expansion of its activities and administrative resources.<sup>36</sup> Figure 3 graphs the change in federal spending in inflation-adjusted dol-

Figure 3  
Growth in Federal Spending and Employment, 1960 – 2018



Source: Federal spending data come from Office of Management and Budget, Historical Tables, Table 1.1, Summary of Receipts, Outlays, and Surpluses or Deficits: 1789–2025. Employment data come from Bureau of Labor Statistics, Occupational Employment Statistics: Federal Government, including U.S. Postal Service, <https://www.bls.gov/oes/home.htm>. Federal spending is an estimate from the historical table. Bureau of Labor Statistics employment data for 2018 are an average, excluding December.

lars and the number of federal employees. While spending has quintupled since 1960, the federal workforce in 2020 is not much bigger than it was at the end of the Eisenhower administration. There are a number of reasons why federal employment has lagged behind spending. First, the productivity of labor has increased. Simply put, fewer employees are necessary now to do the same amount of work. For example, the federal government needs fewer clerks and typists now than in 1960. Second, the increase in spending has largely been programmatic, meaning dollars flow more or less directly to recipients (such as through Social Security or grants to states) rather than to agency officials that use budgets and spend money. Finally, the federal government increasingly implements programs through arrangements with states and local governments or contracts with a web of nongovernment actors. Regardless, the federal government is managing a significantly



larger number of programs and dollars with about the same number of people. As one respondent wrote, “The administration places new missions without increasing your budget to meet the new demands. Agencies are forced to let civil service personnel go to make room for contractors to support their communities.” This places incredible strain on federal management, and the Government Accountability Office regularly highlights important skills gaps that reflect the growing mismatch.<sup>37</sup>

We asked federal executives a number of questions about resources and managing in the modern era. The survey borrowed from surveys of private sector executives and asked respondents whether they agreed or disagreed with the statement “We have enough employees where I work to do a quality job.” Only 45 percent of federal executives agreed or strongly agreed with this statement.<sup>38</sup> By contrast, 58 percent of U.S. private sector executives agreed or strongly agreed with that statement. One distinct feature of the public sector is that managers do not always control decisions about how many people to hire and how to spend money. Elected officials, rather than agency managers, control budgets and the numbers of full-time employees. Trying to fulfill an agency’s core mission with too few employees may be one reason why federal executives evaluate the skills of their workforce as they do.

For a robust administrative state, managers need more than people; managers need the right equipment and the ability to train and develop their workforce. We asked federal managers their level of agreement with the statement “I feel I have the right tools and resources to do my job properly (equipment, software, etc.).”<sup>39</sup> Here there is no difference between the two sectors. Almost three-quarters of public and private sector managers reported having the right equipment. In addition, two-thirds of federal managers agreed that “[My agency] is able to provide necessary training for high performance.”<sup>40</sup>

Collectively, these responses suggest that federal agencies have been unable to hire and restock departing talent, and this appears to be contributing to a decline in the perceived competence of the workforce. While most federal managers reported having access to necessary equipment, less than half reported having enough employees to do a quality job.

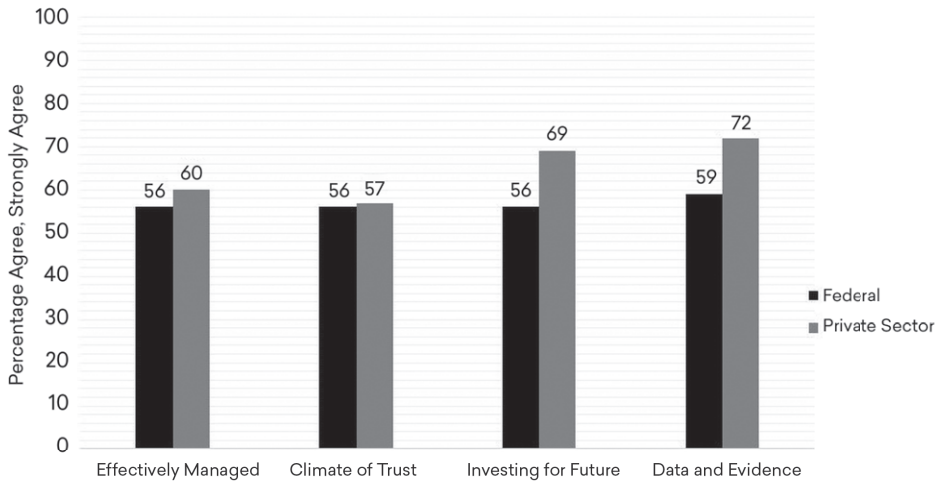
**F**or some observers, the nation’s poor pandemic response had less to do with a lack of capacity in the workforce. Rather, the nation’s poor pandemic response boils down to bad management characterized by a lack of trust between the administration and civil servants and an unwillingness to rely on data and science in decision-making. Is that true across the government? Most respondents reported a climate of trust within their agencies and that their agencies make decisions based on data. Respondents overall had significantly lower trust in the White House, however.

To begin, we asked federal executives their level of agreement with the statement “[My agency] is an effectively managed, well-run organization.”<sup>41</sup> As Figure 4 reveals, among respondents, 56 percent agreed or strongly agreed with that statement, compared with 60 percent in the private sector. It is a little hard to make sense of this topline number since respondents are themselves managers, key figures in the management team of their agency. It was a little like asking federal executives whether they were doing a good job. Appointees generally hold more responsibility and are more sanguine about how well agencies are managed. If we limit responses to career professionals, the percentage of executives agreeing that their agency is well run is closer to 55 percent.

Where federal executives have concerns about management, this often manifests itself in trust, particularly in the public sector. New political leaders have doubts about the intentions and competence of the organization’s rank-and-file and vice versa.<sup>42</sup> Indeed, while in office, President Trump referred to civil servants as the “deep state” and part of the swamp that needs draining.<sup>43</sup> Civil servants used formal dissent channels and other means (such as inspectors general and whistleblower offices) to express their concerns about policy decisions and purported illegal activities.<sup>44</sup> A number of former officials spoke out against the Trump administration and its actions.<sup>45</sup> To see whether this reported mutual distrust had seeped down into agencies, we asked executives whether they agreed or disagreed with the statement “There is a climate of trust in my agency.” Fifty-six percent agreed or strongly agreed that there was a climate of trust.<sup>46</sup> This means that 44 percent did not agree with that statement. To put these numbers in perspective, the government percentage is slightly lower than responses from the private sector (57 percent agree or strongly agree). In the private sector, however, there is arguably an understanding that firms are about profits rather than the public interest.

These differences in trust may help explain differences in management approaches related to long-term planning. We asked respondents whether they agreed or disagreed with the statement “My agency is investing now to enable our future success.”<sup>47</sup> Fifty-six percent of federal executives agreed or strongly agreed, compared with 69 percent in the private sector. There are a number of possible explanations for this difference between the sectors. In the public sector, the breakdown in the federal budget process has meant that agencies are working from short-term stopgap funding to short-term stopgap funding. This makes it hard to plan. Elected officials, particularly during election years, also have a hard time planning for four-to-six years out, when they may no longer be in office. In an era of insecure majorities, the most important thing is the next election, not investing in agency capacity to prevent problems that are hard for the public to see or may never emerge.<sup>48</sup> The day-to-day work of good management – catching people doing the right thing, planning ahead for different contingencies, building robust workforces and processes – is rarely rewarded.

Figure 4  
Federal versus Private Sector Management: Quality, Trust, Planning, Data



"[My agency/company] is an effectively managed, well-run organization."

"There is a climate of trust in my agency/company."

"My agency/company is investing now to enable our future success."

"[My agency/work group] makes decisions based on data."

Source: The firm Mercer Sirota provided the private sector benchmarks to the Partnership for Public Service. Survey on the Future of Government Service, 2020, <https://sfgs.princeton.edu>.

Among respondents, 59 percent agreed or strongly agreed with the statement that their agency "makes decisions based on data."<sup>49</sup> When private sector executives were asked the same question about their companies, 72 percent agreed or strongly agreed that their company makes decisions based upon data. Public sector executives report significantly lower use of data in decision-making than their private sector counterparts. We do not have a comparable survey question from an earlier period to see whether the Trump administration relied less on data than its predecessors. There is some anecdotal evidence in the survey to this effect, however. For example, one respondent reported, "Our political leadership do not rely on facts or data, but on opinions. This is a dramatic change from anything I've experienced in my 30+ year career."

Given the context of the pandemic, we also included a few questions about trust and leadership during the crisis. When we asked about the statement "I trust the senior leadership in [my agency] to respond well in a crisis," 70 percent agreed or strongly agreed. When we asked about their level of agreement with the statement "I trust the White House to respond well in a crisis," however, only 19 per-

cent agreed. Fully 53 percent *strongly disagreed* with that statement. While federal executives have comparable levels of trust and confidence in their organizational leadership, few have confidence in the White House.<sup>50</sup>

As summer turned to fall, President Trump's handling of the COVID pandemic loomed over the 2020 election. The president uneasily defended his leadership role, while his contraction of the virus communicated its own truth about the crisis. Would another president have thwarted the pandemic? Could lives have been saved? The answer to these questions depends on what one believes about the distinctiveness of President Trump and his team *and* the robustness of the public health bureaucracy. The pandemic revealed breaches in the wall public health agencies were supposed to build around an emergent pandemic. Could any president have plugged them all?

As with other aspects of the Trump presidency, it is difficult to disentangle the actions of the bureaucracy from the man himself. The callous and ultimately ineffective response to Hurricane Maria and the hurried and haphazard efforts to increase immigration enforcement suggest both shortcomings in presidential leadership and long-standing capacity problems. Properly prepared, President Trump might have remedied these capacity problems, but he was not the first to neglect the effective management of the executive.<sup>51</sup> The Federal Emergency Management Agency's (FEMA) response to Hurricane Katrina under George W. Bush was woefully inadequate.<sup>52</sup> The Department of the Interior had serious and long-standing problems in the Minerals Management Service prior to the Deepwater Horizon Gulf oil spill under President Obama.<sup>53</sup>

The responses of federal executives illuminate both concerns about the current administration and long-standing problems. On the one hand, they reported satisfaction in their work and its importance. On the other hand, they reported frustration with choices by elected officials that make it difficult for them to fulfill their core mission. One respondent concluded, "I was really confused by this survey. [*sic*] what are you trying to learn? Here is what I want you to consider: the federal government is broken and after years of being abused, dismissed, underappreciated and treated like shit many talented people are going to leave. God help us." While there was a keen sense of worry and frustration targeted at the then-current White House, federal executives' frustration extended to earlier Democratic and Republican administrations.

Years of neglect have culminated in vulnerabilities manifesting themselves in increasingly regular and severe administrative failures. These failures put all of us at risk.

While the problems are serious, there are a few steps we can take that will go a long way toward ensuring a healthier administrative state. As with the pandemic, we can make it easier to diagnose disease and take steps to mitigate the growing

risks. One noteworthy feature of our survey was that *we* conducted it rather than the federal government. This should give us pause. Why do academics and non-profits have to collect data on the fundamental health of the administrative state? Shouldn't the federal government itself collect these data? Unfortunately, while the federal government collects voluminous data of various types, it often collects the wrong kind of data and lacks the analytic capacity to analyze the data it does collect. For example, the primary data the federal government collects to assess the health of the administrative state, the Federal Employee Viewpoint Survey (FEVS), have limited value for modern human resources management, so much so that agencies are opting out: last year, the Department of Veterans Affairs (which employs 18.5 percent of the civilian federal workforce) decided to no longer participate.<sup>54</sup> The Partnership for Public Service, a Washington, D.C., nonprofit, conducts the primary analysis of the FEVS because the Office of Personnel Management does not have the capacity to do that work for itself. Providing improved data and analytic capacity inside the federal government would help increase the use of data and evidence in agency decision-making and incentivize elected officials to be attentive to the health of the bureaucracy.

Another way to ensure greater attention to the long-term health of the departments and agencies of government is to reduce the number of political appointees. There are more than 1,300 presidentially appointed executives that run federal agencies and programs. Many positions are vacant for long periods, particularly at the beginning and end of an administration. President Trump advanced nominees for only 39 percent of these positions during his first year. President Obama found candidates for 54 percent in his first year. Given the rancorous Senate confirmation process, this means that more than one-half of all executive positions were vacant for the first year of each president's term. When the president does fill these positions, executives generally serve for short stints.<sup>55</sup> Their focus naturally is on short-term political objectives rather than long-term agency capacity. This is one reason for the gap in answers between public and private sector executives in the degree of investment in the future. Short-timers, whether the presidential appointees or the temporary careerist fill-ins, cannot do long-term planning. Straightforward efforts to reduce the number of appointed positions would increase executive tenure and improve management.<sup>56</sup>

In addition to improved data to diagnose problems and managerial changes that would make it easier to implement solutions, direct legislative changes can improve the federal personnel system. There is bipartisan agreement that the federal personnel system is broken. The civil service system was created to prevent abuse rather than advance the purposes of the federal government, and both Republicans and Democrats agree that there are problems with workforce recruitment and development, as well as recourse for dealing with poor performers. A number of reasonable proposals exist for comprehensive civil service reform that

strike a middle ground.<sup>57</sup> Such reforms would go a long way toward building back up what has been damaged.

The ongoing political discussion about pandemic response has shed light on the overall health of the agencies, people, and processes that make up the executive part of the federal government. Can the administrative state deliver the services, protections, and help that voters ask for? Not without careful monitoring and attention, ideally in advance of a worldwide pandemic.

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#### ABOUT THE AUTHOR

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#### ENDNOTES

- <sup>1</sup> Jason Douglas, “As Coronavirus Surges in U.S., Some Countries Have Just about Halted It,” *The Wall Street Journal*, July 6, 2020, <https://www.wsj.com/articles/as-coronavirus-surges-in-u-s-some-countries-have-just-about-halted-it-11594037814>.
- <sup>2</sup> Sarah Kliff, Adam Satariano, Jessica Silver-Greenberg, and Nicholas Kulish, “There Aren’t Enough Ventilators to Cope with the Coronavirus,” *The New York Times*, March 18, 2020, <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html>.
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- <sup>5</sup> Eric Lipton, Abby Goodnough, Michael D. Shear, et al., “The CDC Waited ‘Its Entire Existence for This Moment.’ What Went Wrong?” *The New York Times*, June 3, 2020, <https://www.nytimes.com/2020/06/03/us/cdc-coronavirus.html>.
- <sup>6</sup> Michael D. Shear, Noah Weiland, Eric Lipton, et al., “Push to Pass Off Response to Virus Deepened a Crisis,” *The New York Times*, July 19, 2020.
- <sup>7</sup> Francis Fukuyama threads a fine line, arguing that the United States has “vast potential state capacity,” thus implying a leadership problem. Francis Fukuyama, “The Pan-



- demic and Political Order: It Takes a State,” *Foreign Affairs* 99 (4) (2020), <https://www.foreignaffairs.com/articles/world/2020-06-09/pandemic-and-political-order>.
- <sup>8</sup> Dan Goldberg, “‘It’s Going to Disappear’: Trump’s Changing Tone on Coronavirus,” *Politico*, March 17, 2020, <https://www.politico.com/news/2020/03/17/how-trump-shifted-his-tone-on-coronavirus-134246>.
- <sup>9</sup> John Fritze and David Jackson, “Trump Calls to ‘Liberate’ States Where Protesters Have Demanded Easing Coronavirus Lockdowns,” *USA Today*, April 17, 2020, <https://www.usatoday.com/story/news/politics/2020/04/17/coronavirus-trump-calls-liberate-virginia-michigan-minnesota/5152120002/>.
- <sup>10</sup> For details of internal critics of the CDC, see Shear et al., “Push to Pass Off Response to Virus Deepened a Crisis.”
- <sup>11</sup> Lipton et al., “The CDC Waited ‘Its Entire Existence for This Moment.’ What Went Wrong?”
- <sup>12</sup> Caroline Chen, Marshall Allen, and Lexi Churchill, “Internal Emails Show How Chaos at the CDC Slowed the Early Response to Coronavirus,” *ProPublica*, March 26, 2020, <https://www.propublica.org/article/internal-emails-show-how-chaos-at-the-cdc-slowed-the-early-response-to-coronavirus>.
- <sup>13</sup> For example, in a February 2017 appearance before the Conservative Political Action Conference, White House Advisor Stephen K. Bannon described the deconstruction of the administrative state as one of the administration’s three priority goals. See Jon Michaels, “How Trump is Dismantling a Pillar of the American State,” *The Guardian*, November 7, 2017, <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state>; and David French, “Trump Wants to Deconstruct the Regulatory State? Good. Here’s How You Start,” *National Review*, February 24, 2017, <https://www.nationalreview.com/2017/02/administrative-state-deconstruction-trump-steve-bannon-cpac/>.
- <sup>14</sup> See, for example, John J. Dilulio, *Bring Back the Bureaucrats* (West Conshohocken, Pa.: Templeton Press, 2014); Francis Fukuyama, *Political Order and Political Decay* (New York: Farrar, Straus, and Giroux, 2014); National Commission on the Public Service, *Leadership for America: Rebuilding the Public Service* (Washington, D.C.: Lexington Books, 1989); National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington, D.C.: Brookings Institution Press, 2003); and Paul R. Verkuil, *Valuing Bureaucracy: The Case for Professional Government* (New York: Cambridge University Press, 2017).
- <sup>15</sup> See Christopher Hood, “A Public Management for All Seasons?” *Public Administration* 69 (1) (1991): 3–19; David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume, 1992); and Al Gore, *From Red Tape to Results: Creating a Government that Works Better and Costs Less* (Washington, D.C.: U.S. Government Printing Office, 1993).
- <sup>16</sup> David E. Lewis, “Deconstructing the Administrative State,” *Journal of Politics* 81 (3) (2019): 767–789.
- <sup>17</sup> Michael Lewis, *The Fifth Risk* (New York: W. W. Norton and Company, 2018).
- <sup>18</sup> See Partnership for Public Service, *The Federal Government: A Nobel Profession* (Washington, D.C.: Partnership for Public Service, 2002), <https://ourpublicservice.org/wp-content/uploads/2002/12/193690852dfe6b696a3d8216af41ee89-1414079066.pdf>.

- <sup>19</sup> We surveyed all political appointees, all career members of the Senior Executive Service, all career members of the Senior Foreign Service in Washington, and comparable managers in agencies without members of the Senior Executive Service or Senior Foreign Service. We also surveyed top GS14 and GS15 managers running programs and agencies, identified by titles. We limited our sample to those with email addresses in the *Federal Yellow Book*. At the time of writing (the survey was still in the field), we had 952 responses, or about 5.5 percent of the sample. We report results weighted by appointment type, location, and agency.
- <sup>20</sup> All results reported here are weighted top line results from the survey. N=992. Margin of error (MoE) is +/-3.3 for the full sample and +/- 4.53 to 5.07 for half samples (depending upon some variation in sample size). For full details of the methods, see Government Service Survey, [sfgs.princeton.edu](https://sfgs.princeton.edu).
- <sup>21</sup> The firm Mercer Sirota provided the private sector benchmarks to the Partnership for Public Service. Mercer Sirota conducts regular surveys of firms, including scores of questions, on a regular basis.
- <sup>22</sup> Given the complexity of reaching federal executives working at home during the pandemic, we left the survey in the field for several months. Federal executives working at home are harder to reach with paper letters and phone calls and so we had to rely on emails and voice mail messages to reach respondents. For details of the initial release, see Partnership for Public Service, “Partnership for Public Service Releases Preliminary Federal Executive Survey Data, Announces New Initiative to Renew the Federal Government,” October 14, 2020, <https://ourpublicservice.org/publications/partnership-for-public-service-releases-preliminary-federal-executive-survey-data-announces-new-initiative-to-renew-the-federal-government/>.
- <sup>23</sup> “To what extent do you agree or disagree with the following statements?” “My work portfolio changed as a result of the pandemic.” Strongly disagree (12), Disagree (22), Neither agree nor disagree (7), Agree (32), Strongly agree (27); MoE +/-4.53 to 5.07. “[My agency] has a sense of urgency for getting things done.” Strongly disagree (4), Disagree (8), Neither agree nor disagree (8), Agree (41), Strongly agree (38); MoE +/-3.33. “The public services [my agency] provides suffered as a result of the pandemic.” Strongly disagree (17), Disagree (29), Neither agree nor disagree (11), Agree (24), Strongly agree (18); MoE +/-4.53 to 5.07. “In [my agency] we had the IT tools necessary to telework effectively during the pandemic.” Strongly disagree (4), Disagree (9), Neither agree nor disagree (7), Agree (40), Strongly agree (40); MoE +/-4.53 to 5.07.
- <sup>24</sup> James L. Perry and Lois R. Wise, “The Motivational Bases of Public Service,” *Public Administration Review* 50 (3) (1990): 367–373.
- <sup>25</sup> Most developed democracies have pay compression in their public sector workforces, paying a bit higher in wages and benefits at the low end of the pay scale relative to the private sector and a bit lower in wages and benefits at the higher end of the pay scale. For research on wage compression in the public sector, see, for example, George J. Borjas, “The Wage Structure and Sorting of Workers in the Public Sector,” NBER Working Paper 9313 (Cambridge, Mass.: National Bureau of Economic Research, 2002); and Domenico Depalo, Raffaella Giordano, and Evangelia Papapetrou, “Public-Private Wage Differentials in Euro-Area Countries: Evidence from Quantile Decomposition Analysis,” *Empirical Economics* 49 (3) (2015): 985–1015.
- <sup>26</sup> “Considering everything, how satisfied are you with your job?” Very dissatisfied (3), Dissatisfied (6), Neither satisfied nor dissatisfied (10), Satisfied (43), Very satisfied (37);

- MoE +/-3.33. “Considering everything, how satisfied are you with [your agency]?” Very dissatisfied (4), Dissatisfied (11), Neither satisfied nor dissatisfied (14), Satisfied (43), Very satisfied (28); MoE +/-3.33.
- <sup>27</sup> “To what extent do you agree or disagree with the following statements?” “The federal government is a good employer during a crisis.” Strongly disagree (2), Disagree (5), Neither agree nor disagree (18), Agree (48), Strongly agree (27); MoE +/-4.53 to 5.07.
- <sup>28</sup> “To what extent do you agree or disagree with the following statements?” “Promotions in [my agency/my company] are based on a person’s ability.” Strongly disagree (6), Disagree (12), Neither agree nor disagree (19), Agree (43), Strongly agree (19), Don’t know (1); MoE +/-3.33 (for government responses). “I recommend [my agency/my company] as a good place to work.” Strongly disagree (3), Disagree (6), Neither agree nor disagree (12), Agree (42), Strongly agree (37); MoE +/-4.53 to 5.07 (for government responses). “The work environment at [my agency] supports the development of new and innovative ideas.” Strongly disagree (6), Disagree (10), Neither agree nor disagree (15), Agree (43), Strongly agree (25); MoE +/-4.53 to 5.07 (for government responses).
- <sup>29</sup> “To what extent do you agree or disagree with the following statements?” “[My agency] is able to recruit the best employees.” Strongly disagree (7), Disagree (20), Neither agree nor disagree (19), Agree (38), Strongly agree (17), Don’t know (\*); MoE +/-4.53 to 5.07. “My agency is able to retain its best employees.” Strongly disagree (5), Disagree (18), Neither agree nor disagree (19), Agree (44), Strongly agree (13), Don’t know (1); MoE +/-3.33.
- <sup>30</sup> The 2014 results for “[My agency] is able to retain its best employees” are Strongly disagree (5), Disagree (28), Neither agree nor disagree (22), Agree (38), Strongly agree (7); MoE +/-1.8.
- <sup>31</sup> “To what extent do you agree or disagree with the following statements?” “An inadequately skilled workforce is a significant obstacle to [my agency] fulfilling its core mission.” From 2020: Strongly disagree (12), Disagree (21), Neither agree nor disagree (6), Agree (21), Strongly agree (39), Don’t know (\*); MoE +/-4.53 to 5.07. From 2014: Strongly disagree (13), Disagree (31), Neither agree nor disagree (17), Agree (25), Strongly agree (14); MoE +/-2.6.
- <sup>32</sup> The standard error of the ratings varies from 0.02 to 0.04.
- <sup>33</sup> Joe Davidson, “Top Civil Servants Leaving Trump Administration at a Quick Clip,” *The Washington Post*, September 9, 2018, <https://www.washingtonpost.com/politics/2018/09/10/top-civil-servants-leaving-trump-administration-quick-clip/>; and Kathleen Doherty, David E. Lewis, and Scott Limbocker, “Executive Control and Turnover in the Senior Executive Service,” *Journal of Public Administration Research and Theory* 29 (2) (2019): 159–174.
- <sup>34</sup> Courtney Buble, “The Aging Federal Workforce Needs ‘New Blood,’ Experts Say,” *Government Executive*, August 30, 2019, <https://www.govexec.com/workforce/2019/08/aging-federal-workforce-needs-new-blood-experts-say/159585/>.
- <sup>35</sup> “To what extent do you agree or disagree with the following statements?” “[My agency] often loses good candidates to other positions because of the time it takes to hire.” Strongly disagree (1), Disagree (11), Neither agree nor disagree (13), Agree (33), Strongly agree (40), Don’t know (2); MoE +/-4.53 to 5.07. Eighty-two percent of those who agreed with the statement “An inadequately skilled workforce is a significant obstacle to [my agency] fulfilling its core mission” identified the long hiring process as a contributor to their difficulty maintaining a skilled workforce. “To what extent do the fol-

- lowing factors contribute to the difficulty [your agency] has in maintaining a skilled workforce? Hiring process takes too long." Not at all (2), Little (4), Some (11), A good bit (23), A great deal (59), Don't know (1).
- <sup>36</sup> Diulio, *Bring Back the Bureaucrats*.
- <sup>37</sup> U.S. Government Accountability Office, "Substantial Efforts Needed to Achieve Greater Progress in High-Risk Areas," March 2019, <https://www.gao.gov/assets/700/697245.pdf>.
- <sup>38</sup> "To what extent do you agree or disagree with the following statements?" "We have enough employees where I work to do a quality job." Strongly disagree (13), Disagree (30), Neither agree nor disagree (12), Agree (31), Strongly agree (14); MoE +/- 4.53 to 5.07.
- <sup>39</sup> "To what extent do you agree or disagree with the following statements?" "I feel I have the right tools and resources to do my job properly (equipment, software, etc.)." Strongly disagree (4), Disagree (14), Neither agree nor disagree (10), Agree (46), Strongly agree (27); MoE +/- 3.33.
- <sup>40</sup> "To what extent do you agree or disagree with the following statements?" "[My agency] is able to provide necessary training for high performance." Strongly disagree (4), Disagree (13), Neither agree nor disagree (14), Agree (44), Strongly agree (23); MoE +/- 3.33.
- <sup>41</sup> "To what extent do you agree or disagree with the following statements?" "[My agency/ Company] is an effectively managed, well-run organization." Strongly disagree (9), Disagree (15), Neither agree nor disagree (20), Agree (37), Strongly agree (19); MoE +/- 3.33.
- <sup>42</sup> William G. Resh, *Rethinking the Administrative Presidency: Trust, Intellectual Capital, and Appointee-Careerist Relations in the George W. Bush Administration* (Baltimore: The Johns Hopkins University Press, 2015).
- <sup>43</sup> Evan Osnos, "Trump vs. the 'Deep State': How the Administration's Loyalists Are Quietly Reshaping American Governance," *The New Yorker*, May 21, 2018, <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state>.
- <sup>44</sup> Juliet Eilperin, Lisa Rein, and Marc Fisher, "Resistance from Within: Federal Workers Push Back against Trump," *The Washington Post*, January 31, 2017, [https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html).
- <sup>45</sup> Kimberly Dozier, "As Election Day Nears, More of Trump's Former Officials Are Speaking Out against Him," *Time* magazine, September 24, 2020, <https://time.com/5892948/trump-former-officials-speak-out/>.
- <sup>46</sup> To put this in perspective, the percentage is slightly but not overwhelmingly higher in the private sector (57 percent). "To what extent do you agree or disagree with the following statements?" "There is a climate of trust in my agency/company." Strongly disagree (10), Disagree (19), Neither agree nor disagree (15), Agree (37), Strongly agree (19); MoE +/- 3.33 (government responses only).
- <sup>47</sup> "To what extent do you agree or disagree with the following statements?" "[My agency/ Company] is investing now to enable our future success." Strongly disagree (7), Disagree (16), Neither agree nor disagree (19), Agree (34), Strongly agree (22); MoE +/- 3.33 (government responses only).

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- <sup>48</sup> Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).
- <sup>49</sup> “To what extent do you agree or disagree with the following statements?” “[My agency/work group] makes decisions based on data.” Strongly disagree (7), Disagree (14), Neither agree nor disagree (18), Agree (37), Strongly agree (22), Don’t know (2); MoE +/-3.33 (government responses only).
- <sup>50</sup> “To what extent do you agree or disagree with the following statements?” “I trust the senior leadership in [my agency] to respond well in a crisis.” Strongly disagree (7), Disagree (13), Neither agree nor disagree (9), Agree (35), Strongly agree (35), Don’t know (\*); MoE +/-4.53 to 5.07. “I trust the White House to respond well in a crisis.” Strongly disagree (53), Disagree (17), Neither agree nor disagree (9), Agree (10), Strongly agree (9), Don’t know (1); MoE +/-4.53 to 5.07.
- <sup>51</sup> Paul C. Light, “A Cascade of Failures: Why Government Fails, and How to Stop It” (Washington, D.C.: Brookings Institution Press, 2014), [https://www.brookings.edu/wp-content/uploads/2016/06/Light\\_Cascade-of-Failures\\_Why-Govt-Fails.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Light_Cascade-of-Failures_Why-Govt-Fails.pdf).
- <sup>52</sup> David E. Lewis, *The Politics of Presidential Appointments* (Princeton, N.J.: Princeton University Press, 2008).
- <sup>53</sup> Chris Good, “Head of Minerals Management Service Resigns,” *The Atlantic*, May 27, 2010, <https://www.theatlantic.com/politics/archive/2010/05/head-of-minerals-management-service-resigns/57344/>.
- <sup>54</sup> Nicole Ogrysko, “VA Drops the FEVS in Favor of Its Own Employee Engagement Survey,” *Federal News Network*, June 28, 2018, <https://federalnewsnetwork.com/all-news/2018/06/va-drops-the-fevs-in-favor-of-its-own-employee-engagement-survey/>.
- <sup>55</sup> Matthew Dull and Patrick S. Roberts, “Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009,” *Presidential Studies Quarterly* 39 (3) (2009): 432–453; and Anne Joseph O’Connell, “Vacant Offices: Delays in Staffing Top Agency Positions,” *University of Southern California Law Review* 82 (5) (2009): 913–1000.
- <sup>56</sup> David E. Lewis, “How to Solve the Vacancies Problem That Looms over Federal Government,” *The Hill*, June 4, 2020, <https://thehill.com/opinion/white-house/501101-how-to-solve-the-vacancies-problem-that-looms-over-federal-government>.
- <sup>57</sup> See, for example, this set of proposals by the Volcker Alliance and the Partnership for Public Service, “Renewing America’s Civil Service” (New York: Volcker Alliance and the Partnership for Public Service, 2017), <https://www.volckeralliance.org/sites/default/files/Renewing-Americas-Civil-Service.pdf>; and Partnership for Public Service, *A New Civil Service Framework* (New York: Partnership for Public Service, 2018), [https://ourpublicservice.org/wp-content/uploads/2018/09/Building\\_the\\_Enterprise\\_\\_A\\_New\\_Civil\\_Service\\_Framework-2014.04.01.pdf](https://ourpublicservice.org/wp-content/uploads/2018/09/Building_the_Enterprise__A_New_Civil_Service_Framework-2014.04.01.pdf).

# Replacing Bureaucrats with Automated Sorcerers?

*Bernard W. Bell*

*Increasingly, federal agencies employ artificial intelligence to help direct their enforcement efforts, adjudicate claims and other matters, and craft regulations or regulatory approaches. Theoretically, artificial intelligence could enable agencies to address endemic problems, most notably 1) the inconsistent decision-making and departure from policy attributable to low-level officials' exercise of discretion; and 2) the imprecise nature of agency rules. But two characteristics of artificial intelligence, its opaqueness and the nonintuitive nature of its correlations, threaten core values of administrative law. Administrative law reflects the principles that 1) persons be judged individually according to announced criteria; 2) administrative regulations reflect some means-end rationality; and 3) administrative decisions be subject to review by external actors and transparent to the public. Artificial intelligence has adverse implications for all three of those critical norms. The resultant tension, at least for now, will constrain administrative agencies' most ambitious potential uses of artificial intelligence.*

**A**rtificial intelligence/machine learning (AI/ML) algorithms are widely used in the private sector. We experience the results daily: AI/ML algorithms suggest products for purchase and even finish our sentences. But those uses of AI/ML seem tame and impermanent: we can always reject algorithm-generated suggestions.

Can AI/ML become a resource for government agencies, not just in controlling traffic lights or sorting mail, but in the exercise of the government's coercive powers? The federal government has begun to deploy AI/ML algorithms.<sup>1</sup> The embrace of such technologies will profoundly affect not only the public, but the bureaucracies themselves.<sup>2</sup> Might AI/ML bring agencies closer to attaining, in Max Weber's words, "the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations"?<sup>3</sup>

Before exploring such implications, I will discuss AI/ML's capabilities and use by federal agencies, and agencies' functions and environment. Ultimately, we will see that AI/ML is a sort of empirical magic that may assist in coordinating an agency's actions but presents challenges due to its lack of transparency and nonintuitiveness.



The government has long used computers to store and process vast quantities of information.<sup>4</sup> But human beings fully controlled the computers and wrote their algorithms. Programmers had to do all the work of modeling reality: that is, attempting to ensure that their algorithm reflected the actual world, as well as incorporating the agencies' objectives.<sup>5</sup>

AI/ML is much less dependent on the programmer.<sup>6</sup> It finds associations and relationships in data, correlations that are both unseen by its programmers and nonintuitive. As to the latter, for example, an AI/ML algorithm might predict a person's preferred style of shoe based upon the type of fruit the person typically purchases for breakfast.<sup>7</sup> Thus, AI/ML results do not represent cause and effect; correlation does not equal causation. Indeed, as in the example above, AI/ML algorithms may rely upon correlations that defy intuitive expectations about relevance; no one would posit that shoppers consider their breakfast choices when making shoe selections.

The opaque and nonintuitive associations on which AI/ML relies, that is, AI/ML's "black box" quality, have consequences for administrative law.<sup>8</sup> Even knowing the inputs and the algorithm's results, the algorithm's human creator cannot necessarily fully explain, especially in terms of cause and effect, how the algorithm reached those results. The programmer may also be unable to provide an intuitive rationale for the algorithm's results. While computer experts can describe the algorithm's conclusion that people with a particular combination of attributes generally warrant a particular type of treatment, they cannot claim that the algorithm has established that any particular individual with that combination of attributes deserves such treatment.<sup>9</sup>

AI/ML can be used in either a supervised or unsupervised manner. In *supervised learning*, training data are used to develop a model with features to predict known labels or outcomes. In *unsupervised learning*, a model is trained to identify patterns without such labels.<sup>10</sup>

AI/ML is particularly useful in performing four functions: identifying clusters or associations within a population; identifying outliers within a population; developing associational rules; and solving prediction problems of classification and regression.<sup>11</sup> AI/ML is currently less useful when a problem requires "estimating the causal effect of an intervention."<sup>12</sup> Nor can such algorithms resolve non-empirical questions, such as normatively inflected ones, like ethical decisions.<sup>13</sup> Presumably, AI/ML is ill-suited for resolving some empirical questions that frequently arise in administrative and judicial contexts, such as resolving witnesses' differing accounts of past events. In those situations, the data inputs are unclear.

A recent Administrative Conference of the United States (ACUS) study uncovered considerable agency experimentation with or use of AI/ML.<sup>14</sup> Agencies largely employed human-supervised AI/ML algorithms, and

their results were generally used to assist agency decision-makers and agency management in making their own decisions. A few examples follow.

The Securities and Exchange Commission (SEC) uses AI/ML to monitor the securities markets for potential insider trading. The SEC's ARTEMIS system focuses on detecting serial inside traders. A natural language program sifts through 8-K forms submitted by companies to announce important events that occur between their regular securities filings. SEC staff then use a natural language processing algorithm to sift through the forms. Then, a machine learning algorithm identifies trigger events or market changes that warrant investigation. An official reviews the output and decides whether further investigation is justified. If so, SEC staff send a blue sheet request to broker/dealers for relevant trading records. The blue sheet data are analyzed with previously requested blue sheet data by an unsupervised learning model to detect anomalies indicating the presence of insider trading.

The Social Security Administration (SSA) uses several methods to increase the efficiency of its disability benefits claim adjudication process. It has attempted to apply algorithms to claim metadata to create clusters of similar cases it can assign to the same administrative law judge (ALJ). It has also developed an AI/ML analysis of claims to determine the probability of an award of benefits based solely on certain attributes of the claims. Officials use the results in establishing the order in which claims are assigned, moving ones likely to be granted to the head of the line. However, the actual determination of the claim is made by the ALJ.

AI/ML assists adjudicators in preparing disability decisions. The SSA's Insight program allows adjudicators to identify errors in their draft decisions, such as erroneous citations (that is, nonexistent regulation numbers) and misapplication of the vocational grid (the metric used to determine whether sufficient work exists in the national economy for those of a claimant's level of exertional ability, age, and education). Insight also assists the SSA in identifying common errors made by ALJs, outlier ALJs, and areas in which SSA policies need clarification.<sup>15</sup>

The ACUS report discusses the use of AI/ML to sift through the massive number of comments made in response to the Federal Communications Commission's proposed rollback of its net neutrality rules and the Consumer Finance Protection Bureau's use of AI/ML to classify the complaints it receives.<sup>16</sup> Algorithms have been deployed to assist agencies in predicting an industry's potential response to various alternative formulations of a contemplated regulation. The Environmental Protection Agency's (EPA) OMEGA model "sift[s] through the multitude of ways . . . automaker[s] could comply with a proposed greenhouse gas emissions standard to identify the most likely compliance decisions."<sup>17</sup> OMEGA thus has helped the EPA set greenhouse gas emissions standards "that [protect] public health and welfare while remaining cognizant of the time and cost burdens imposed on automakers."<sup>18</sup> OMEGA is not an AI/ML algorithm, but we might see it as a forerunner of AI/ML algorithms that would perform a similar function.<sup>19</sup>

Administrative agencies perform a wide array of functions. Administrative law scholars tend to focus on three broad categories of agency action that lie at the heart of the government's coercive powers: enforcement, adjudication, and rulemaking. These categories derive from the distinction between legislating, enforcing the law, and adjudicating legal disputes.

*Enforcement.* Enforcement involves monitoring regulated entities, identifying statutory or regulatory violations, and pursuing sanctions for such violations. Enforcement is largely an executive function.

Moreover, enforcement has heretofore been considered inherently discretionary: agencies' limited resources simply do not allow them to be present everywhere at all times, much less pursue every potential regulatory violation.<sup>20</sup> Choosing which regulated entities or activities to investigate can be excluded from the realm of consequential decisions. If the entity or person under investigation has been complying with the law (or if the government cannot amass sufficient evidence to prove otherwise), no adverse consequence will ensue. Generally, the cost of undergoing investigation and defending oneself in an unsuccessful government enforcement action is not considered a harm.<sup>21</sup>

*Adjudication.* Adjudication involves resolving individuals' rights against, claims of entitlements from, or obligations to the government. Thus, decisions regarding Social Security disability benefits, veterans' benefits, entitlement to a particular immigration status, and the grant or revocation of government licenses or permits, as well as liability for civil fines or injunctive-type relief, are all adjudications. In mass justice agencies, these adjudications differ substantially from traditional judicial determinations. Traditional judicial decisions often involve competing claims of right and frequently require making moral judgments in the course of resolving cases. The specification of rights and obligations is often intertwined with a determination of the applicable facts.<sup>22</sup> AI/ML algorithms might make quite good predictions regarding the results in such cases, but we are chary about leaving the *actual* decision to an AI/ML algorithm.

Mass adjudication by administrative agencies can often be much more routinized. Consider insurance companies' resolution of automobile accident claims. The judicially crafted law is complex. Liability turns on each actor's "reasonableness," a judgment based on a mixture of law and fact. The complexity represents an effort to decide whether the injured plaintiff is morally deserving of recovery from the defendant driver. Fully litigating such cases requires questioning all witnesses to the accident closely. But insurance companies seeking to resolve mass claims without litigation use traffic laws to resolve liability issues, as an imperfect but efficient metric.<sup>23</sup>

Similarly, the SSA disability determinations could be considered expressions of a societal value judgment regarding which members of society qualify as the *deserving* poor.<sup>24</sup> Such a determination could be unstructured and allow significant

room for adjudicators' application of moral judgments and intuition. But the SSA has, of necessity, established a rigid, routinized, five-step process for evaluating disability claims.<sup>25</sup> And the final step involves assessing whether sufficient jobs the claimant can perform exist in the national economy. That too was routinized by use of a grid, which provided a yes/no answer for each combination of applicants' age, education, and exertional capacity.<sup>26</sup>

Another aspect of agency adjudication warrants attention. Much of traditional litigation, particularly suits for damages, involves assessing historical facts, the who, what, when, where, and why of past events. But agency adjudications can involve predictions as well as historical facts. Thus, licensing decisions are grounded on predictions regarding the likelihood that the applicant will comport with professional standards. Likewise, the last step of the SSA disability determination, whether a person with certain age, educational, and exertional limitations could find a sufficient number of jobs available in the national economy, is a prediction. On the other hand, whether an employer committed an unfair labor practice in treating an employee adversely for union activity is a question of historical fact.

AI/ML excels at making predictions – that is its *sine qua non* – and predictions are all we have with regard to future events (or present events we may want to address without taking a wait-and-see approach).<sup>27</sup> But for an issue such as whether a particular entity engaged in a specific unfair labor practice, we might want to focus on the witness accounts and documentary evidence relevant to that situation, rather than AI/ML-generated correlations.<sup>28</sup> Or to use an example from toxic torts, epidemiological and toxicological studies establishing general causation between a toxin and a toxic harm may be fine for estimating risks to a population exposed to a toxin, but do not prove what courts in toxic torts must determine: namely, whether the harm the *plaintiff* suffered was caused by the *plaintiff's* exposure to a toxin.<sup>29</sup>

*Rulemaking.* Rulemaking involves promulgation of imperatives of general applicability akin to statutes. As administrative law scholars Cary Coglianese and David Lehr suggest, AI/ML's use in rulemaking is limited because that process involves normative judgments and requires “overlay[ing] causal interpretations on the relationship between possible regulations and estimated effect.”<sup>30</sup> The product of agency rulemaking – regulations – may resemble formal legislation, but the rulemaking process is designed to be far less onerous. Agencies often promulgate such regulations by “notice-and-comment” procedures.<sup>31</sup> Those procedures seem deceptively simple, but in practice require the agency to identify and categorize assertions made in thousands of comments regarding the rule's propriety. And with the emphasis on the Office of Management and Budget's (OMB) regulatory review of proposed regulatory actions, a significant part of the rulemaking process consists of assessing the overall costs and benefits attendant the rule.<sup>32</sup>

These legislative rules differ from the guidance rules used to constrain lower-level officials' discretion, direct their decision-making, or advise the public. Leg-

islatiue rules that are the product of notice-and-comment rulemaking have the “force of law”: violation of the rule itself is unlawful, even if the action does not violate the statutory standard implemented by the rule. Rules in the second sense, guidance rules that merely constrain lower-level officials’ discretion or provide guidance to the public, do not replace the legal standard enunciated in the statute upon which they elaborate. They lack the force of law; an agency’s sanction against violators of such guidance rules can be upheld only if the agency can show that the rule-violator’s conduct has transgressed the underlying statute.

For example, a federal statute grants the Federal Trade Commission (FTC) the power to enjoin unfair and deceptive trade practices. The FTC could issue a guidance rule specifying that gas station operators’ failure to post octane ratings on gas pumps is inherently deceptive. The guidance might well be based on extensive consumer research the FTC has conducted. If the FTC promulgates a guidance rule, each time it goes to court to enforce an order it enters against a rule-violator, it will have to prove that the gas station’s failure to post octane ratings was deceptive. If, however, the FTC promulgates a force of law rule, that is, a “legislative rule,” when it goes to court to enforce an order against a violator, it need merely show that the octane ratings were not posted. The gas station operator can no longer mount a defense asserting that its customers were not confused or deceived by the lack of posted octane ratings.

Legislative rules can be analogized to algorithms. The human lawgiver correlates a trait with a particular mischief the legislative rule is designed to address. The correlation may often be imperfect; but rules are inherently imperfect. However, we would probably not accept laws based on a nonintuitive correlation of traits to the mischief to be prevented, even if the correlation turns out to be a pretty good predictor. Even with respect to legislatures, whose legislative judgments reflected in economic and social legislation are given a particularly wide berth, courts purport to require some “rational basis” for associating the trait that is targeted with the mischief to be prevented.<sup>33</sup> The demands for some intuitive connection, some cause-and-effect relationship between a trait targeted and a harm to be prevented, is even greater when agencies promulgate regulations.<sup>34</sup> And to carry the analogy further to guidance rules, it is not clear at all that a nonintuitive connection would be allowed as a guidance rule used to direct the resolution of agency adjudications.

**T**he critical *internal* challenge for government bureaucracies is synchronizing line-level decision-makers, both with the intended agency policy and with each other.<sup>35</sup> Internal review processes can serve this function, but such processes still require coordination at the review level and involve duplication of effort. The agency may seek to reduce decision-making metrics to written rules (either legislative rules or guidance rules).<sup>36</sup> Agencies also expend resources

on training, and retraining, its lower-level employees. And sometimes agency leadership may encounter bureaucratic resistance, yet another reason some line-level employees' determinations might not comport with the leadership's policy.<sup>37</sup>

Agencies' internal structures reflect the fundamental tension between rule-like and standard-like decision metrics. Rules are decision metrics that do not vary significantly depending on the circumstances.<sup>38</sup> Rules facilitate decisional consistency, assist line officials' efforts to follow agency policy, and allow superiors to more easily detect departures. But rules are invariably over-inclusive or under-inclusive: they sweep within them nonproblematic cases or fail to capture problematic cases, or both.<sup>39</sup> And the simpler the rule, the larger the subset of undesirable results.

For instance, due to the increasing heart attack risks as people age, in 1960, the Federal Aviation Administration promulgated the following rule: "No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in air carrier operations."<sup>40</sup> The rule is over-inclusive: many pilots over sixty have a very low heart attack risk, far lower than that of many pilots under sixty. A case-by-case determination based on medical records would surely have led to a more calibrated response. Even a rule that took into account not only age, but multiple health factors would produce a smaller number of decisions in which relatively risk-free pilots would be grounded.

Some of a rules' inherent limitations can be counteracted by according discretion to line employees. Reintroducing, or retaining, elements of discretion can be particularly important when decisions must be based on circumstances or factors that either: 1) were not envisioned by rule-drafters (rules can quickly be undermined by new scientific, economic, social, or other developments); or 2) cannot be quantified.<sup>41</sup> So agency leadership must accord low-level decision-makers some discretion.<sup>42</sup> But what if rules could be fine-grained, to take virtually innumerable factors into account? The subset of wrong decisions would become narrower.<sup>43</sup>

Agencies must also contend with various *external* forces. Agencies' legitimacy rests upon their responsiveness to the elected officials of the executive and legislative branches, namely the president and Congress. The president and Congress must retain the capacity to assert control over agencies, through the exercise of the executive authority and congressional oversight, *inter alia*, and change agency behavior by enactment of statutes modifying the law. But even such legislative and executive oversight is insufficient to ensure agency fidelity to law.<sup>44</sup> Thus, agency decisions are generally subject to judicial review as well, to ensure that agencies remain faithful to their statutory mandates. Nevertheless, judicial review is generally deferential. On-the-record adjudications need only be based upon "substantial evidence." Less informal adjudications and regulations need only satisfy the "arbitrary and capricious" standard of review.<sup>45</sup>



The public, and both the relevant regulated entities and the beneficiaries, must have notice of their obligations. Regulated entities must be able to predict how agencies will decide cases, and beneficiaries must also be able to determine when a challenge to a regulated entity's actions is warranted. Moreover, no agency can long prosper without the general support of the public, or at least key constituencies.<sup>46</sup>

**W**hat are the implications of governments' use of AI/ML? Use of AI/ML algorithms will increase uniformity of adjudicatory and enforcement decisions, and their more fine-grained metrics should minimize the subset of incorrect decisions.<sup>47</sup> But agencies will face a basic decision: should the algorithms' decisions be binding or nonbinding?

If binding, many fewer line officials, that is, bureaucrats, will be needed to implement the program on the ground, and those that remain may well experience a decline in status within the agency. But in embracing AI/ML algorithms, agency leadership may merely have traded one management problem for another: managing the data specialists assuming a more central role in the agency's implementation of its programs. They will make decisions about the algorithm, the data used to train it, and the tweaks necessary to keep it current. Nonexpert leadership may feel even less capable of managing data scientists than the line officials they replaced.

If the algorithm is nonbinding, the key question will be *when* to permit human intervention. There is reason to believe that permitting overrides will produce no better results than relying on the algorithm itself.<sup>48</sup> Of course, agency leadership may disagree. In that case, the challenge will be to structure human intervention so as to avoid reintroducing the very problem the AI/ML algorithm was created to solve: unstructured, intuitive discretion leading to discrepant treatment of regulated entities and beneficiaries.

The uniformity wrought by AI/ML algorithms will come at the cost of increasing the opacity of the decision-making criteria and, potentially, the intuitiveness of the decision metric.

**E**xplainability is critical within the agency. It is critical to any attempt to have a line-level, or upper-level, override system. If one does not know the weight the AI/ML algorithm accorded various criteria, how is one supposed to know whether it gave that consideration appropriate weight? At the same time, the algorithms' opacity might lead to staff resistance to such AI/ML decisions.<sup>49</sup> Lack of explainability poses challenges to agency managers seeking to retain control over policy, because not even the agency head can reliably discern with precision the policy the AI/ML algorithm applies in producing its decisions. At best, agency leadership will be dependent on computer and data processing specialists as critical intermediaries in attempting to manage the algorithm.

AI/ML algorithm's lack of explainability impedes the agency's navigation of its external environment as well. It complicates relationships with Congress and the components of the Executive Office of the President (EOP), like the OMB, with which the agency interacts. The more opaque and less intuitive the explanation of the AI/ML's metrics and decision-making process, the harder it will be to convince members of Congress and the relevant EOP components of the soundness of the agency's decisions. And the more fine-grained the nonintuitive distinctions between applicants for assistance or regulated entities, the more those distinctions will be viewed as literally arbitrary (that is, turning on inexplicable distinctions) and, well, bureaucratic. The reaction of the general public will presumably be even more extreme than that of elected leaders and their staff.

But let us turn to the implications of AI/ML's lack of explainability for judicial review. While judicial review of agency decision-making is deferential, it is hardly perfunctory.<sup>50</sup> In many circumstances, agency decisions are a type of prediction, even though they may not be framed in that way. Does licensing this pilot pose a risk to public safety? Is this applicant for benefits unable to obtain a job? These are questions in which AI/ML algorithms excel. But, as noted earlier, some agency decisions require a determination regarding past events. Sometimes the facts, one might say "the data," are in dispute. Two people might have a different account of a key conversation between a management official and an employee central to determining whether an unfair labor practice occurred. Current AI/ML algorithms are unlikely to provide much assistance in resolving such a contest.

In addition, if a statute is applicable, an AI/ML algorithm might be incapable of producing a decision *explaining* the result to the satisfaction of a court. The Supreme Court's decision in *Allentown Mack Sales & Service v. NLRB* provides a cautionary tale. There, a company refused to bargain with a union, asserting a "reasonable doubt" that a majority of its workforce continued to support the union. In practice, the National Labor Relations Board (NLRB) required employers making such an assertion to prove the union's loss of majority support. The Court held that an agency's application of a rule of conduct or a standard of proof that diverged from the formally announced rule or standard violated basic principles of adjudication.<sup>51</sup> But that is what an AI/ML algorithm does: it creates a standard different from that announced, which may well be nonintuitive, and then consistently applies it *sub rosa*. AI/ML algorithms reveal that certain data inputs are commonly associated with particular outcomes to which we accord legal significance, but fail to show the basis for believing that the correlation held in a particular circumstance that occurred in the past. In other words, AI/ML can make predictions about the future, but offers little insight into how the record in the particular case leads to particular conclusions with respect to legally significant historical facts.

And often, in close cases, an agency can support either decision open to it. Is the reviewing court to be satisfied with reversing only "clearly erroneous" AI/ML-

produced decisions? Some have suggested that courts review the process for decision-making rather than the outcomes produced by AI/ML algorithms.<sup>52</sup>

That approach certainly has appeal, but how is the nonexpert (perhaps mostly technophobic) judiciary supposed to review the AI/ML algorithms? Courts faced a similar dilemma when Congress created new regulatory agencies for complex scientific and technological subjects, accorded other agencies more rule-making power, and permitted more pre-enforcement challenges to regulations. The court's response was a "hard-look" approach, ensuring that the relevant factors were considered, irrelevant factors were not, and that public participation was guaranteed.<sup>53</sup>

Explainability, in another sense, is also important with respect to legislative rules. Let us say that an agency seeks to make explicit what is implicit in an AI/ML algorithm. Assume an AI/ML algorithm finds a correlation between long-haul truck drivers involved in accidents and 1) drivers' credit scores; 2) certain genomic markers; and 3) a family history of alcohol abuse. The agency could license or de-license based on a grid capturing the correlation. How would such a rule fare?

First, correlation does not equal causation. Some additional factor(s) more intuitively relevant to a driver's dangerousness might be propelling the relationship between it and the three variables. Given the basic requirement for some logical relationship between a regulation and its purposes, courts will surely demand either some *intuitive* relationship or *nonintuitive causal* relationship between the variables and truck driver dangerousness. After all, even if there is a fairly high correlation between the variables and truck driver dangerousness, many individuals will be excluded from truck driving due to apparently irrelevant factors. The agency will presumably have to provide the intuitive or causal relationship for the regulation to avoid its invalidation as "arbitrary and capricious."<sup>54</sup>

The example points to another problem. We want to base regulatory limitations (or provision of benefits) on people's conduct, not their traits, either immutable, like genomic markers or family history, or mutable but irrelevant, like credit score. One's reward or punishment by the government should turn on conduct to be encouraged or deterred, not accidents of birth. And to the extent the correlation involves a mutable marker, potential truck drivers will focus on improving their performance on a characteristic that does not improve their driving, like raising their credit score, rather than improving their capabilities as drivers. And, of course, some characteristics, like race and gender, cannot be used, unless the agency can proffer a strong justification that is not based on treating an individual as sharing the characteristic of his or her group.<sup>55</sup>

Third, the function of notice-and-comment requirements would be undermined if the agency can conclude that its process for developing the algorithm is sound, and thus that the correlation is valid, even though the reason the correlation makes sense remains a mystery. Commenters themselves would have to in-

investigate the correlation to either prove it is coincidental (essentially disproving all possible reasons for the existence of the correlation) or identify the underlying causes driving the correlation.

In short, even if an agency reveals its AI/ML algorithms' magic, by attempting to capture an AI/ML-discovered correlation in a legislative rule, the agency's attempt to promulgate a counterintuitive rule will likely fail.

Briefly turning to agency enforcement efforts, courts have recognized, particularly in the Freedom of Information Act (FOIA) context, the inherent tension between making sure there is no "secret law" and preventing circumvention of the law.<sup>56</sup> Transparency may mean that the enforcement criteria will become the effective rule, replacing the law being enforced. And given the complexity of AI/ML algorithms, transparency could have a disparate effect depending on the wealth and sophistication of the regulated entity.<sup>57</sup>

Nevertheless, to the extent transparency is desirable, it will be more difficult to achieve when the AI/ML algorithm is proprietary, as the FOIA probably allows the agency to withhold such information and the government may feel compelled to do so.<sup>58</sup>

**T**echnology tends to make fools of those who venture predictions. Nevertheless, the potential that AI/ML will reduce the number and status of line-level employees is present. But before AI/ML makes significant inroads, agencies will have to grapple with making AI/ML algorithms' "black box" magic more transparent and intuitive.

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#### ABOUT THE AUTHOR

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#### ENDNOTES

- <sup>1</sup> See David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, and Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Washington, D.C.: Administrative Conference of the United States, 2020).
- <sup>2</sup> Mark Bovens and Stavros Zourdis, "From Street-Level to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control," *Public Administration Review* 62 (2) (2002): 174.

- <sup>3</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 975.
- <sup>4</sup> The concerns about government data storage and its privacy implications were explored early on by an influential government advisory committee. See U.S. Department of Health, Education, and Welfare, *Records, Computers, and the Rights of Citizens*, Report of the Secretary's Advisory Committee on Automated Personal Data Systems (Washington, D.C.: U.S. Department of Health, Education, and Welfare, 1973).
- <sup>5</sup> Paul Schwartz, "Data Processing and Government Information: The Failure of the American Legal Response to the Computer," *Hastings Law Journal* 43 (5) (1992): 1321, 1342.
- <sup>6</sup> Even AI/ML algorithms remain dependent on programmers to a certain extent. David Lehr and Paul Ohm, "Playing with the Data: What Legal Scholars Should Learn about Machine Learning," *UC Davis Law Review* 51 (2) (2017): 653, 672–702. This includes unsupervised algorithms, which are dependent upon the choice of data set to train them.
- <sup>7</sup> Andrew Selbst and Solon Barocas, "The Intuitive Appeal of Explainable Machines," *Fordham Law Review* 87 (3) (2018): 1085, 1096–1099. This is eerily similar to the derisive caricature of legal realism as suggesting that judges' decisions may turn on the quality of their breakfast. See Alex Kozinski, "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making," *Loyola of Los Angeles Law Review* 26 (4) (1993): 993.
- <sup>8</sup> Lehr and Ohm, "Playing with the Data," 706; Cary Coglianese and David Lehr, "Regulating by Robot: Administrative Decision Making in the Machine-Learning Era," *The Georgetown Law Journal* 105 (5) (2017): 1147, 1159–1160; and Engstrom et al., *Government by Algorithm*, 28.
- <sup>9</sup> See Lehr and Ohm, "Playing with the Data," 707–710 (describing four potential types of explanations for the results produced by AI/ML algorithms).
- <sup>10</sup> John D. Kelleher and Brendan Tierney, *Data Science* (Cambridge, Mass.: The MIT Press, 2018), 72–74; and Engstrom et al., *Government by Algorithm*, 12.
- <sup>11</sup> Kelleher and Tierney, *Data Science*, 109.
- <sup>12</sup> Aziz Z. Huq, "The Right to a Human Decision," *Virginia Law Review* 675 (3) (2020): 611, 634.
- <sup>13</sup> *Ibid.*
- <sup>14</sup> Engstrom et al., *Government by Algorithm*.
- <sup>15</sup> Felix F. Bajandas and Gerald K. Ray, "Implementation and Use of Electronic Case Management Systems in Federal Agency Adjudication," Administrative Conference Recommendation 2018-3 (Washington, D.C.: Administrative Conference of the United States, 2018), 44–49.
- <sup>16</sup> Engstrom et al., *Government by Algorithm*, 59–64.
- <sup>17</sup> *Natural Resources Defense Council v. EPA*, 954 F.3d 150, 153 (2d Cir. 2020).
- <sup>18</sup> *Ibid.*
- <sup>19</sup> Coglianese and Lehr, "Regulating by Robot," 1174–1175.
- <sup>20</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985); and *Morrison v. Olson*, 487 U.S. 654, 727–728, 731–732 (1988) (Scalia dissenting).

- <sup>21</sup> See *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 592 (D.C. Cir. 1971); *Nor-Am Agri Prods. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970) (*en banc*); and *Dow Chemical v. Ruckelshaus*, 477 F.2d 1317 (8th Cir. 1973).
- <sup>22</sup> Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, Conn.: Yale University Press, 1983).
- <sup>23</sup> H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment*, 2nd ed. (New York: Routledge, 1980).
- <sup>24</sup> Matthew Diller, “Entitlement and Exclusion: The Role of Disability in the Social Welfare System,” *UCLA Law Review* 44 (1998): 361, 372–374.
- <sup>25</sup> See *Bowen v. Yuckert*, 482 U.S. 137, 140–142 (1987).
- <sup>26</sup> *Heckler v. Campbell*, 461 U.S. 458, 460–462 (1983).
- <sup>27</sup> Lehr and Ohm, “Playing with the Data,” 670–672.
- <sup>28</sup> Say A’s computer screensaver is blue 90 percent of the time. But yesterday, B had a view of the computer screen at a particular time, say 9:33 pm. If we wanted to predict the color of A’s screen in the future, reliance on the 90 percent algorithm is fine. But it would seem odd to do so if the issue is whether the screen was blue at 9:33 pm yesterday, given the availability of a witness. In short, reliance on the rule can never tell one when the rule is incorrect in a particular situation. See Huq, “The Right to a Human Decision,” 679.
- <sup>29</sup> *Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm, Volume 1* (Philadelphia: American Law Institute, 2010), §28, comm. c(3) & c(4).
- <sup>30</sup> Coglianese and Lehr, “Regulating by Robot,” 1172–1173.
- <sup>31</sup> Some can be promulgated even less informally. See 5 U.S.C §553.
- <sup>32</sup> Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 6th ed. (Chicago: American Bar Association, 2018), 252–263.
- <sup>33</sup> Bernard W. Bell, “Legislative History without Legislative Intent: The Public Justification Approach to Statutory Interpretation,” *Ohio State Law Journal* 60 (1) (1999): 1, 35 (discussing the rational basis test). Granted, such rationality rarely results in invalidation of federal statutes because of the federal judiciary’s concerns about its institutional position in a democracy. *Ibid.*, 28–30.
- <sup>34</sup> *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29, 43, n. 9 (1983).
- <sup>35</sup> *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Commission*, 517 P.2d 289, 293 (Or. Ct. App. 1973).
- <sup>36</sup> *Sun Ray Drive-In Dairy*, 517 P.2d, 293 (discussing necessity of “written standards and policies”).
- <sup>37</sup> Jennifer Nou, “Civil Servant Disobedience,” *Chicago Kent Law Review* 94 (2) (2019): 349, 349–350, n. 1–4. Bureaucratic resistance is hardly new. President Truman reportedly quipped that if General Eisenhower became president: “He’ll sit here, and he’ll say, ‘Do this! Do that!’ And *nothing will happen*. Poor Ike—it won’t be a bit like the Army.” Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: John Wiley & Sons, 1960).
- <sup>38</sup> See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1993), 48–52, 86–87, 104, n. 35.



- <sup>39</sup> *Ibid.*, 31–34.
- <sup>40</sup> *Air Line Pilots v. Quesada*, 276 F.2d 892 (2d Cir. 1961), *cert. denied*, 366 U.S. 962 (1961).
- <sup>41</sup> *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001) (observing that “a strict age sixty cutoff, without exceptions, [might be] better suited to 1959 than to 2001”).
- <sup>42</sup> Rule-like adjudicatory criteria may need to have exceptions—*Heckler v. Campbell*, 461 U.S., 467, n. 11; and *U.S. v. Storer Broadcasting*, 351 U.S. 192 (1956)—or a robust regime permitting waivers for situations in which the rule is just not appropriate. See Alfred Aman, “Administrative Equity: An Analysis of Exceptions to Administrative Rules,” *Duke Law Journal* 31 (2) (1982): 277; and Aaron L. Nielson, “Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices,” J. Reuben Clark Law School, Brigham Young University Research Paper No. 17-27 (Washington, D.C.: Administrative Conference of the United States, 2017).
- <sup>43</sup> See Schauer, *Playing by the Rules*, 83, 155.
- <sup>44</sup> The political branches of government may not be able to respond to every agency action or may desire or even encourage agencies’ unfaithfulness to the intent of the legislature that enacted the statute.
- <sup>45</sup> 5 U.S.C. §706(2).
- <sup>46</sup> For a general discussion of the external environment of agencies and its implications for agency decision-making, see Rachel Augustine Potter, *Bending the Rules: Procedural Politicking in the Bureaucracy* (Chicago: University of Chicago Press, 2019); and *Sun Ray Drive-In Dairy v. Oregon Liquor Control Commission*, 517 P.2d at 293–294.
- <sup>47</sup> This all assumes that circumstances do not fundamentally change. Ali Alkhatib and Michael Bernstein, “Street-Level Algorithms: A Theory at the Gaps Between Policy and Discretion,” CHI ’19: Proceedings of the 2019 CHI Conference on Human Factors in Computing Systems Paper No. 530, May 2019. However, AI/ML algorithms are dynamic; they can continue to revise themselves in light of later data. Coglianese and Lehr, “Regulating by Robot,” 1159. Legislative rules are notorious for their “ossification.” See, for example, Lubbers, *A Guide to Federal Agency Rulemaking*, 404–405. The 1978 grid is still used by the SSA. While AI/ML algorithms offer the prospect of better modifying decision rules in light of changes in the data, one can anticipate judicial discomfort with nontransparent, nonintuitive rules changes in decision rules outside the normal “notice-and-comment” procedures applicable to the revision of rules. See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000).
- <sup>48</sup> Huq, “The Right to a Human Decision,” 665–667.
- <sup>49</sup> Engstrom et al., *Government by Algorithm*, 28 (reporting SEC line-level enforcement staff seeking more information regarding AI/ML designation of certain investment advisors as “high risk”).
- <sup>50</sup> Michael Asimow, ed., *A Guide to Federal Agency Adjudication* (Chicago: American Bar Association, 2003), 85, n. 9–10.
- <sup>51</sup> The Court noted that “the consistent repetition of [such a] breach can hardly mend it.” *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374 (1998).
- <sup>52</sup> Huq, “The Right to a Human Decision,” 675; and Lehr and Ohm, “Playing with the Data,” 710–716.

- <sup>53</sup> See *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission*, 547 F.2d 633, 655–657 (D.C. Cir. 1976) (Bazelon concurring) (“in highly technical areas, where judges are institutionally incompetent to weigh evidence for themselves, a focus on agency procedures will prove less intrusive, and more likely to improve the quality of decisionmaking, than judges ‘steeping’ themselves ‘in technical matters’”).
- <sup>54</sup> Here I disagree with Coglianesi and Lehr, “Regulating by Robot,” 1202.
- <sup>55</sup> Coglianesi and Lehr believe this can be overcome, if only the AI/ML algorithm is sufficiently fine-tuned and takes multiple factors into account. *Ibid.*, 1201. I am far more skeptical. For instance, considering life expectancy charts that use race as a variable would be unconstitutional, even if an AI/ML algorithm were used to make the tables more complex and fine-tuned by taking numerous other variables into account.
- <sup>56</sup> See *Dirksen v. HHS*, 803 F.2d 1456, 1458–1459, 1461–1462 (9th Cir. 1986) (Ferguson dissenting) (the majority’s approach makes “the risk of circumvention . . . indistinguishable from the prospect of enhanced compliance”). The high-2 exemption that *Dirksen* applied was overturned in *Milner v. Department of the Navy*, 562 U.S. 562 (2011). The FOIA exemption for law enforcement records that poses a risk of circumvention remains.
- <sup>57</sup> Engstrom et al., *Government by Algorithm*, 86–87.
- <sup>58</sup> Coglianesi and Lehr, “Regulating by Robot,” 1210–1211. See also *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019) (expanding FOIA exemption 4). However, the ACUS study reported that a majority of the AI/ML algorithms in their survey were developed by the government in-house. Engstrom et al., *Government by Algorithm*, 18.

# Administrative Law in the Automated State

*Cary Coglianese*

*In the future, administrative agencies will rely increasingly on digital automation powered by machine learning algorithms. Can U.S. administrative law accommodate such a future? Not only might a highly automated state readily meet longstanding administrative law principles, but the responsible use of machine learning algorithms might perform even better than the status quo in terms of fulfilling administrative law's core values of expert decision-making and democratic accountability. Algorithmic governance clearly promises more accurate, data-driven decisions. Moreover, due to their mathematical properties, algorithms might well prove to be more faithful agents of democratic institutions. Yet even if an automated state were smarter and more accountable, it might risk being less empathic. Although the degree of empathy in existing human-driven bureaucracies should not be overstated, a large-scale shift to government by algorithm will pose a new challenge for administrative law: ensuring that an automated state is also an empathic one.*

**B**ecause the future knows no bounds, the future of administrative law is vast indeed. In the near term, administrative law in the United States will undoubtedly center around how the U.S. Supreme Court decides cases raising core administrative law issues such as the nondelegation doctrine and judicial deference to agencies' statutory interpretation. But over the longer term, new issues will confront the field of administrative law as new changes occur in government and in society. One major change on the horizon will be an increasingly automated administrative state in which many governmental tasks will be carried out by digital systems, especially those powered by machine learning algorithms.

Administrative agencies today undertake a range of activities – granting licenses, issuing payments, adjudicating claims, and setting rules – each of which traditionally has been executed by government officials. But it is neither difficult nor unrealistic to imagine a future in which members of the public, when they interact with government, increasingly find themselves interacting predominantly with digital systems rather than human officials. Even today, the traditional administrative tasks for which human beings have long been responsible are increasingly augmented by computer systems. Few people in the United States today think

twice about using government websites to apply for unemployment benefits, register complaints, or file paperwork, rather than visiting or telephoning government offices. The federal government has even created an online portal – USA.gov – that provides its users with easy access to the panoply of resources and digital application processes now available to the public via an extensive network of state and federal government websites.

The transition to this online interaction with government over the last quarter-century portends what will likely be a deeper and wider technological transformation of governmental processes over the next quarter-century. Moving beyond the digitization of front-end communication with government, the future will likely feature the more extensive automation of back-end decision-making, which today still often remains firmly in the discretion of human officials. But we are perhaps only a few decades away from an administrative state that will operate on the basis of automated systems built with machine learning algorithms, much like important aspects of the private sector increasingly will. This will lead to an administrative state characterized by what I have elsewhere called *algorithmic adjudication* and *robotic rulemaking*.<sup>1</sup> Instead of having human officials make discretionary decisions, such as judgments about whether individual claimants qualify for disability benefits, agencies will be able to rely on automated systems to make these decisions. Claims-processing systems could be designed, for example, to import automatically a vast array of data from electronic medical records and then use an artificial intelligence system to process these data and determine whether claimants meet a specified probability threshold to qualify for benefits.<sup>2</sup>

If many of the tasks that government currently completes through decision-making by human officials come to be performed entirely by automated decision tools and computer systems, how will administrative law respond to this transformation to an automated state? How *should* it?

Most existing administrative law principles can already accommodate the widespread adoption of automation throughout the administrative state. Not only have agencies already long relied on a variety of physical machines that exhibit automaticity, but an automated state – or at least a *responsible* automated state – could be thought of as the culmination of administrative law’s basic vision of government that relies on neutral public administration of legislatively delegated authority. Administrative law will not need to be transformed entirely to operate in an era of increasing automation because that automation, when responsibly implemented, will advance the democratic principles and good governance values that have long underlay administrative law.

Nevertheless, even within an otherwise responsible automated state, there will come to be an important ingredient of good governance that increasingly could turn out to be missing: human empathy. Even bureaucracies comprising human officials can be cold and sterile, but an era of extreme automation could present a

state of crisis in human care – or, more precisely, a crisis in the lack of such care. In an increasingly automated state, administrative law will need to find ways to encourage agencies to ensure that members of the public will continue to have opportunities to engage with humans, express their voices, and receive acknowledgment of their predicaments. The automated state will, in short, also need to be an empathic state.

**T**he information technology revolution that launched several decades ago shows few signs of abating. Technologists today are both revealing and reaching new frontiers with the use of advanced algorithmic technologies variously referred to as artificial intelligence, machine learning, and predictive analytics. These terms – sometimes used interchangeably – encompass a broad range of tools that permit the rapid processing of large volumes of data that can yield highly accurate forecasts and thereby facilitate the automation of many distinct tasks. In the private sector, algorithmic innovations are allowing the automation of a wide range of functions previously handled by trained humans, such as the reading of chest X-rays, the operation of automobiles, and the granting of loans by financial institutions.

Public administrators have taken notice of these algorithmic advances in the private sector. Some advances in the business world even have direct parallels to governmental tasks. Companies such as eBay and PayPal, for example, have developed their own highly successful automated online dispute resolution tools to resolve complaints without the direct involvement of human employees.<sup>3</sup> Overall, government officials see in modern data analytics the possibility of building systems that could automate a variety of governmental tasks, all with the potential to deliver increased administrative efficiency, speed, consistency, and accuracy.

The vision of an automated administrative state might best be exemplified today by developments in the Republic of Estonia, a small Baltic country that has thoroughly embraced digital government as a mark of distinction. The country's e-Estonia project has transformed the nation's administration by digitizing and securely storing vast amounts of information about individuals, from their medical records to their employment information to their financial statements.<sup>4</sup> That information is cross-linked through a digital infrastructure called X-Road, so that a person's records can be accessed instantly by any entity that needs them, subject to limits intended to prevent wrongdoing. This widespread digitization has facilitated the automation of a range of government services: individuals can easily vote, apply for a loan, file their taxes, and complete other administrative tasks without ever needing to interact with a human official, simply by transferring their digital information to complete forms and submit requests. By automating many of its bureaucratic processes, Estonia has saved an estimated 2 percent of its

GDP each year. The country is even exploring the use of an automated “judge” to resolve small claims disputes.<sup>5</sup>

Other countries such as Denmark and South Korea are also leading the world in the adoption of so-called e-government tools.<sup>6</sup> The United States may not have yet achieved quite the same level of implementation of automated government, but it is certainly not far behind. Federal, state, and local agencies throughout the United States have not only embraced web-based applications – such as those compiled on the USA.gov website – but have begun to deploy the use of machine learning algorithms to automate a range of administrative decision-making processes. In most of these cases, human officials remain involved to some extent, but a significant amount of administrative work in the United States is increasingly conducted through digital systems.

Automation helps federal, state, and local governments navigate challenging resource-allocation decisions in the management of public programs. Several states have implemented algorithmic tools to help make decisions about the award of Medicaid and other social benefits, seeking to speed up and improve the consistency of claims processing.<sup>7</sup> Similarly, the federal Social Security Administration uses automated tools to help support human appeals judges’ efforts to provide quality oversight of an agency adjudicatory process that handles as many as 2.5 million disability benefits claims each year.<sup>8</sup>

Municipalities rely on automated systems when deciding where to send health and building inspectors.<sup>9</sup> Some local authorities use such systems when making choices about where and when to deploy social workers to follow up on allegations of child abuse and neglect.<sup>10</sup> Federal agencies, meanwhile, have used algorithmic systems to analyze consumer complaints, process reports of workplace injuries, and evaluate public comments on proposed rules.<sup>11</sup>

Criminal law enforcement agencies throughout the United States also rely on various automated tools. They have embraced tools that automate deployment of officer patrols based on predictions of locations in cities where crime is most likely to occur.<sup>12</sup> Many law enforcement agencies have also widely used automated facial recognition tools to facilitate suspect identification or for security screenings.<sup>13</sup>

Regulatory agencies similarly have deployed automated tools for targeting auditing and enforcement resources. States have employed data analytics to detect fraud and errors in their unemployment insurance programs.<sup>14</sup> The federal Securities and Exchange Commission and the Internal Revenue Service have adopted algorithmic tools to help detect fraudulent behavior and other wrongdoing.<sup>15</sup>

In these and other ways, public authorities across the United States have already made considerable strides toward an increasingly automated government. Over the next several decades, governmental use of automation driven by artificial intelligence tools will surely spread still further and is likely to lead to the transformation of or phasing out of many jobs currently performed by govern-



ment employees.<sup>16</sup> The future state that administrative law will govern will be one of increasingly automated administration.

**C**an administrative law accommodate an automated state? At first glance, the prospect of an automated state might seem to demand a fundamental re-writing of administrative law. After all, administrative law developed to constrain the discretion of human officials, to keep their work within the bounds of the law, and to prevent the kinds of principal-agent problems that can arise in the relationships between human decision-makers. Moreover, one of administrative law's primary tenets – that governmental processes should be transparent and susceptible to reason-giving – would seem to stand as a barrier to the deployment of the very machine learning algorithms that are driving the emerging trends in automation.<sup>17</sup> That is because machine learning algorithms – sometimes referred to as “black-box” algorithms – have properties that can make them opaque and hard to explain. Unlike traditional statistical algorithms, in which variables are selected by humans and resulting coefficients can be pointed to as explaining specified amounts of variation in a dependent variable, learning algorithms effectively discover their own patterns in the data and do not generate results that associate explanatory power to specific variables. Data scientists can certainly understand and explain the goals and general properties of machine learning algorithms, but overall these algorithms have a degree of autonomy – hence their “learning” moniker – that can make it more difficult to explain precisely why they reach any specific forecast that they do. They do not usually provide any basis for the kind of causal statements often used to justify administrative decisions (such as “X is justified because it causes Y”).

As a result, transparency concerns are reasonable when considering a future of an automated state based on machine learning systems. But on even a modest degree of additional reflection, these concerns would appear neither to act as any intrinsic barrier to the reliance on machine learning automation nor necessarily to demand any fundamental transformation of U.S. administrative law to accommodate an automated state. Administrative law has never demanded anything close to absolute transparency nor required meticulous or exhaustively detailed reasoning, even under the arbitrary and capricious standard of Section 706 of the Administrative Procedure Act.<sup>18</sup> Administrative agencies that rely on machine learning systems should be able to satisfy any reason-giving obligations under existing legal principles by explaining in general terms how the algorithm was designed to work and demonstrating that it has been validated to work as designed by comparing its results to those generated by the status quo process. An adequate explanation could involve merely describing the type of algorithm used, disclosing the objective the algorithm was established to meet, and showing how the algorithm processed a certain type of data to produce results that were shown to meet the algorithm's defined objective as well as or better than current processes.

Such an explanation would, in effect, mirror the kinds of explanations that administrators currently offer when they rely on physical rather than digital machines. For example, in justifying the imposition of an administrative penalty on a food processor for failing to store perishable food at a cool temperature, an administrator need not be able to explain exactly how a thermometer works, just that it reports temperatures accurately. Courts have long treated instrument validation for physical machines as a sufficient basis for agency actions grounded on such instruments. Moreover, they have typically deferred to administrators' expertise in cases in which government officials have relied on complex instruments or mathematical analyses. In fact, the U.S. Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council* called upon courts to be their "most deferential" when an administrative agency is "making predictions, within its area of special expertise, at the frontiers of science."<sup>19</sup> More recently, the Supreme Court noted in *Marsh v. Oregon Natural Resource Council* that whenever an agency decision "requires a high degree of technical expertise," we must defer to "the informed discretion of the responsible agencies."<sup>20</sup> Lower courts have followed these instructions and have upheld agencies' reliance on complex (even if not machine learning) algorithms in various contexts.

It is difficult to see the Supreme Court gaining any more confidence in judges' ability to provide independent technological assessments when technologies and statistical techniques grow still more complex in an era of machine learning. Unless the Court should gain a new source of such confidence and abandon the postures it took in *Baltimore Gas & Electric* and *Marsh*, nothing in administrative law's reason-giving requirements would seem to serve as any insuperable barrier to administrative agencies' more extensive reliance on systems based on machine learning or other advanced predictive techniques, even if they are properly characterized today as black-box algorithms. That portrayal of machine learning algorithms as a black box also appears likely to grow less apt in the coming decades, as data scientists are currently working extensively to develop advanced techniques that can better explain the outputs such complex algorithms generate.<sup>21</sup> Advances in "explainable" artificial intelligence techniques likely will only make automation still more compatible with long-standing administrative law values.

Of course, all of this is not to say that agencies will or should always receive deference for how they design or operate their systems. Under the standard articulated in *Motor Vehicle Manufacturers Association v. State Farm Insurance Co.*, agencies will still need to provide basic information about the purposes behind their automated systems and how they generally operate.<sup>22</sup> They will need to show that they have carefully considered key design options. And they will likely need to demonstrate through accepted auditing and validation efforts that these systems do operate to produce results as intended.<sup>23</sup> But all this is to say that it will almost certainly be possible for agencies to provide the necessary information to justify the

outcomes that their systems produce. In other words, long-standing administrative law principles seem ready and fit for an automated age.

**I**n important respects, a shift to automated administration could even be said to represent something of an apotheosis of the principles behind administrative law. Much of administrative law has been focused on the potential problems created by the discretion that human officials exercise under delegated authority. By automating administration, those problems can be mitigated, and the control of human discretion may be enhanced by the literal hardwiring of certain governmental tasks.

Automation can advance two major themes that have long characterized much of U.S. administrative law: one theme centers on keeping the exercise of administrative authority democratically accountable, while the other seeks to ensure that such authority is based on sound expert judgment. The reason-giving thrust behind the Administrative Procedure Act's arbitrary and capricious standard, for example, reflects both of these themes. Reasoned decision-making provides a basis for helping ensure that agencies both remain faithful to their democratic mandates and base their decisions on sound evidence and analysis. Likewise, the institutionalized regimen of White House review of prospective regulations both facilitates greater accountability to a democratically elected president and promotes expert agency decision-making through the benefit-cost analysis that it calls on agencies to conduct.<sup>24</sup>

In the same vein, in approving judicial deference to agencies' statutory interpretations, it is little accident that the Supreme Court's widely cited decision in *Chevron v. Natural Resources Defense Council* stressed both reasons of democratic accountability and substantive expertise.<sup>25</sup> It highlighted how agencies are situated within a "political branch of the Government" as well as how they simultaneously possess "great expertise" – and thus are better suited than courts to make judgments about the meaning of ambiguous statutory terms.<sup>26</sup> Although the future of the *Chevron* doctrine itself appears uncertain at best, the Court's underlying emphasis on accountability and expertise is unlikely to disappear, as they are inherent qualities of administrative governance.

Both qualities can be enhanced by machine learning and automation. It is perhaps most obvious that automation can contribute to the goal of expert administration. When automated systems improve the accuracy of agency decision-making – which is what makes machine learning and other data analytic techniques look so promising – this will necessarily promote administrative law's goal of enhancing agency expertise. Artificial intelligence promises to deliver the state of the art when it comes to expert governing. When the Veterans Administration (VA), for example, recently opted to rely on an automated algorithmic system to predict which veterans are at a higher risk of suicide (and thus in need of more

urgent care), it did so because this analytic system was smarter than even experienced psychiatrists.<sup>27</sup> “The fact is, we can’t rely on trained medical experts to identify people who are truly at high risk [because they are] no good at it,” noted one VA psychiatrist.<sup>28</sup>

Likewise, when it comes to administrative law’s other main goal – democratic accountability – automated systems can also advance the ball. The democratic advantages of automation may seem counterintuitive at first: machine-based governance would hardly seem consistent with a Lincolnesque notion of government by “the people.” But the reality is that automated systems themselves still demand people who can design, test, and audit such systems. As long as these human designers and overseers operate systems in a manner consistent with the parameters set out for an agency in its governing statute, automated systems themselves can prevent the kind of slippage and shirking that can occur when agencies must rely on thousands of human officials to carry out major national programs and policies. Even when it comes to making new rules under authority delegated to it by Congress, agencies could very well find that automation promotes democratic accountability rather than detracts from it. Some level of accountability will be demanded by the properties of machine learning algorithms themselves. To function, these algorithms depend not merely on an “intelligible principle” to guide them; they need a principle that can be precisely specified in mathematical terms.<sup>29</sup> In this way, automation could very well drive the demand for still greater specification and clarity in statutes about the goals of administration, more than even any potential judicial reinvigoration of the nondelegation doctrine might produce.

Although oversight of the design and development of automated systems will remain important to ensure that they are created in accord with democratically affirmed values, once operating, they should pose far fewer opportunities for the kinds of problems, such as capture and corruption, that administrative law has long sought to prevent. Unlike human beings, who might pursue their own narrow interests instead of those of the broader public, algorithms will be programmed to optimize the objectives defined by their designers. As long as those designers are accountable to the public, and as long as the system objectives are defined in non-self-interested ways that comport with relevant legislation, then the algorithms themselves pose no risk of capture and corruption. In an important sense, they will be more accountable in their execution than even human officials can be when it comes to implementing law.

This is not to suggest that automated systems will amount to a panacea nor that their responsible development and use will be easy. They can certainly be used in legally and morally problematic ways. Furthermore, their use by agencies will still be subject to constraints beyond administrative law – for instance, legal constraints under the First Amendment or the Equal Protection Clause – that apply to all gov-

ernmental actions. In fact, equality concerns raised by the potential for algorithmic bias may well become the most salient legal issue that automated systems will confront in the coming years. Bias obviously exists with human decision-making, but it also is a concern with machine learning algorithms, especially when the underlying data used to train these algorithms already contain (human-created) biases. Nevertheless, absent an independent showing of animus, automated systems based on machine learning algorithms may well withstand scrutiny under equal protection doctrine, at least if that doctrine does not change much over time.<sup>30</sup>

Governmental reliance on machine learning algorithms would be able to avoid actionable conduct under equal protection analysis even if an administrator elected to use data that included variables on race, gender, or other protected classifications. As long as the objective the algorithm is programmed to achieve is not stated in terms of such protected classifications, it will be hard, if not impossible, to show that the algorithm has used any class-based variables as a determinative basis for any particular outcome. The outcomes these algorithms generate derive from effectively autonomous mathematical processes that discern patterns among variables and relationships between different variables. Presumably, machine learning algorithms will seldom if ever support the kind of clear and categorical determinations based on class-related variables that the Supreme Court has rejected, where race or other protected classes have been given an explicit and even dispositive weight in governmental decisions.<sup>31</sup> Even when used with data on class variables, the use of machine learning algorithms might well lead to better outcomes for members of a protected class overall.<sup>32</sup>

Moreover, with greater reliance on algorithm-based automated systems, governments will have a new ability to *reduce* undesired biases by making mathematical adjustments to their algorithms, sometimes without much loss in accuracy.<sup>33</sup> Such an ability will surely make it easier to tamp out biases than it currently is to eliminate humans' implicit biases. In an automated state of the future, government may find itself less prone to charges of undue discrimination.

For these reasons, it would appear that long-standing principles of administrative law, and even constitutional law, will likely continue to operate in an automated state, encouraging agencies to act responsibly by both preserving democratic accountability and making smarter, fairer decisions. This is not to say that existing principles will remain unchanged. No one should expect that any area of the law will stay static over the long term. Given that some scholars and observers have already come to look critically upon governmental uses of algorithms, perhaps shifting public attitudes will lead to new, potentially more demanding administrative law principles specifically targeting the automated features of the future administrative state.<sup>34</sup>

While we should have little doubt that norms and best practices will indeed solidify around how government officials ought to use automated systems – much

as they have developed over the years for the use of other analytic tools, such as benefit-cost analysis – it is far from clear that the fundamentals of administrative law will change dramatically in an era of algorithmic governance.<sup>35</sup> Judges, after all, will confront many of the same difficulties scrutinizing machine learning algorithms as they have confronted in the past with respect to other statistical and technical aspects of administration, which may lead to continued judicial deference as exemplified in *Baltimore Gas & Electric*.<sup>36</sup> In addition, rather than public attitudes turning against governmental use of algorithmic tools, it may just as easily be expected that public expectations will be shaped by widespread acceptance of artificial intelligence in other facets of life, perhaps even leading to affirmative demands that governments use algorithmic tools rather than continuing to rely on slower or less reliable processes. Cautious about ossifying algorithmic governance, judges and administrative law scholars might well resist the urge to impose new doctrinal hurdles on automation.<sup>37</sup> They may also conclude, as would be reasonable, that existing doctrine contains what is needed to ensure that government agencies use automated systems responsibly.

As a result, if government agencies wish to expand the responsible use of properly trained, audited, and validated automated systems that are sufficiently aligned with legislative mandates and improve agencies' ability to perform key tasks, it seems they will hardly need any transformation of traditional administrative law principles to accommodate these innovations. Nor will administrative law need to adapt much, if at all, to ensure that kind of responsible use of algorithmic governance. Overall, an automated state could conceivably do a better job than ever before of fulfilling the vision of good governance that has long animated administrative law.

Still, even if the prevailing principles of administrative law can deal adequately with public sector use of machine learning algorithms, something important could easily end up getting lost in an automated state. Such an administrative government might be smarter, more democratically accountable, and even more fair. But it could also lack feeling, even more than sterile bureaucratic processes do today. Interactions with government through smartphones and automated chats may be fine for making campground reservations at national parks or even for filing taxes. But they run the risk of leaving out an important ingredient of good governance – namely, empathy – in those circumstances in which government must make highly consequential decisions affecting the well-being of individuals. In such circumstances, empathy demands that administrative agencies provide opportunities for human interaction and for listening and expressions of concern. An important challenge for administrative law in the decades to come will be to find ways to encourage an automated state that is also an empathic state.



A desire for empathy, of course, need not impede the development of automation.<sup>38</sup> If government manages the transition to an automated state well, it is possible that automation can enhance the government's ability to provide empathy to members of the public, but only if government officials are sufficiently attentive to the need to do so. This need will become even greater as the overall economy moves toward greater reliance on artificial intelligence and other automated systems. Society will need to value and find new ways to fulfill those tasks involving empathy that humans are good at fulfilling. The goal should be, as technologist Kai-Fu Lee has noted, to ensure that, "while AI handles the routine optimization tasks, human beings . . . bring the personal, creative, and compassionate touch."<sup>39</sup>

Already, public administration experts recognize that this is one of the great potential advantages of moving to an automated state. It can free up government workers from drudgery and backlogs of files to process, while leaving them more time and opportunities to connect with those affected by agency decisions.<sup>40</sup> A recent report jointly issued by the Partnership for Public Service and the IBM Center for Business and Government explains the importance of this shift in what government employees do:

Many observers who envision greater use of AI in government picture more face-to-face interactions between agency employees and customers, and additional opportunities for more personalized customer services. The shift toward employees engaging more with agency customers is expected to be one of several possible effects of automating administrative tasks. Relieved of burdensome paperwork, immigration officers could spend more time interacting with visa applicants or following up on individual immigration cases. Scientists could allot more of their day to working with research study participants. And grants managers could take more time to learn about and support individual grantees. On average, federal employees now spend only 2 percent of their time communicating with customers and other people outside their agencies, or less than one hour in a workweek, according to one study. At the same time, citizens want government to do better. The experiences customers have with companies is driving demand for personalized government services. In a survey of more than 6,000 people from six countries, including the United States, 44 percent of respondents identified personalized government services as a priority.<sup>41</sup>

Not only does a substantial portion of the public already recognize the need for empathic, personalized engagement opportunities with government, but as private sector organizations invest more in personalized services, this will only heighten and broaden expectations for similar empathy from government. We already know from extensive research on procedural justice that the way that government treats members of the public affects their sense of legitimacy in the outcomes they receive.<sup>42</sup> To build public trust in an automated state, government authorities will need to ensure that members of the public still feel a human con-

nection. As political philosopher Amanda Greene has put it, “government must be seen to be sincerely caring about each person’s welfare.”<sup>43</sup>

Can administrative law help encourage empathic administrative processes? Some might say that this is already a purpose underlying the procedural due process principles that make up administrative law. *Goldberg v. Kelly*, after all, guarantees certain recipients of government benefits the right to an oral hearing before a neutral decision-maker prior to the termination of their benefits, a right that does afford at least an opportunity for affected individuals to engage with a theoretically empathic administrative judge.<sup>44</sup> But the now-canonical test of procedural due process reflected in *Mathews v. Eldridge* is almost entirely devoid of attention to the role of listening, caring, and concern in government’s interactions with members of the public.<sup>45</sup> *Mathews* defines procedural due process in terms of a balance of three factors: 1) the affected private interests; 2) the potential for reducing decision-making error; and 3) the government’s interests concerning fiscal and administrative burdens. Machine learning automation would seem to pass muster quite easily under the *Mathews* balancing test. The first factor – the private interests at stake – will be external to machine learning, but machine learning systems would seem always to fare well under the second and third factors. Their great promise is that they can reduce errors and lower administrative costs.

This is where existing principles of administrative law will fall short in an automated state and where the need for greater vision will be needed. Hearing rights and the need for reasons are about more than just achieving accurate outcomes, which is what the *Mathews* framework implies. On the contrary, hearings and reasoning might not be all that good at achieving accurate outcomes, at least not as consistently as automated systems. A 2011 study showed that, among the fifteen most active administrative judges in one office of the Social Security Administration, “the judge grant rates . . . ranged . . . from less than 10 percent being granted to over 90 percent.”<sup>46</sup> The study revealed, for example, that three judges in this same office awarded benefits to no more than 30 percent of their applicants, while three other judges awarded to more than 70 percent.<sup>47</sup> Other studies have suggested that racial disparities may exist in Social Security disability awards, with certain Black applicants tending to receive less favorable outcomes than White applicants.<sup>48</sup> Against this kind of track record, automated systems promise distinct advantages when they can be shown to deliver fairer, more consistent, and even speedier decisions.

But humans will still be good at listening and empathizing with the predicaments of those who are seeking assistance or other decisions from government, or who otherwise find themselves subjected to its constraints.<sup>49</sup> It is that human quality of empathy that should lead the administrative law of procedural due process to move beyond just its current emphasis on reducing errors and lowering costs.

To some judges, the need for an administrative law of empathy may lead them to ask whether members of the public have a “right to a human decision” within

an automated state.<sup>50</sup> But not all human decisions are necessarily empathic ones. Moreover, a right to a human decision would bring with it the possibility that the law would accept all the flaws in human decision-making simply to retain one of the virtues of human engagement. If automated decisions turn out increasingly to be more accurate and less biased than human ones, a right to a decision by humans would seem to deny the public the desirable improvements in governmental performance that algorithms can deliver.

Administrative law need not stand in the way of these improvements. It can accept the use of machine learning algorithms while nevertheless pushing government forward toward additional opportunities for listening and compassionate responses.<sup>51</sup> Much as the Supreme Court in *Goldberg v. Kelly* insisted on a pre-termination hearing for welfare recipients, courts in the future can ask whether certain interests are of a sufficient quality and importance to demand that agencies provide supplemental engagement and assistance with individuals subjected to automated processes. Courts could in this way seek to reinforce best practices in agency efforts to provide empathic outreach and assistance.

In the end, if administrative law in an automated state is to adopt any new rights, society might be better served if courts avoid the recognition of a right to a human decision. Instead, courts could consider and seek to define a right to human *empathy*.

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#### AUTHOR'S NOTE

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#### ENDNOTES

<sup>1</sup> See Cary Coglianese and David Lehr, "Regulating by Robot: Administrative Decision Making in the Machine-Learning Era," *The Georgetown Law Journal* 105 (5) (2017): 1147, 1171.

- <sup>2</sup> See Cary Coglianese and David Lehr, “Transparency and Algorithmic Governance,” *Administrative Law Review* 71 (1) (2019): 1, 9.
- <sup>3</sup> See Benjamin H. Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (New York: Encounter Books, 2017), 111–115.
- <sup>4</sup> See Nathan Heller, “Estonia, the Digital Republic,” *The New Yorker*, December 11, 2017, <https://www.newyorker.com/magazine/2017/12/18/estonia-the-digital-republic>; and Republic of Estonia, Ministry of Economic Affairs and Communications, *Report of Estonia’s AI Taskforce* (Tallinn: Republic of Estonia, Ministry of Economic Affairs and Communications, 2019), [https://f98cc689-5814-47ec-86b3-db505a7c3978.filesusr.com/ugd/7df26f\\_486454c9f32340b28206e140350159cf.pdf](https://f98cc689-5814-47ec-86b3-db505a7c3978.filesusr.com/ugd/7df26f_486454c9f32340b28206e140350159cf.pdf).
- <sup>5</sup> See Eric Niler, “Can AI Be a Fair Judge? Estonia Thinks So,” *Wired*, March 25, 2019, <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>.
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- <sup>7</sup> See Cary Coglianese and Lavi M. Ben Dor, “AI in Adjudication and Administration,” *Brooklyn Law Review* 86 (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3501067](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3501067).
- <sup>8</sup> See David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, and Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Washington, D.C.: The Administrative Conference of the United States, 2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>.
- <sup>9</sup> See Gabe Cherry, “Google, U-M to Build Digital Tools for Flint Water Crisis,” *University of Michigan News*, May 3, 2016, <https://news.umich.edu/google-u-m-to-build-digital-tools-for-flint-water-crisis/>; City of Chicago, “Food Inspection Forecasting: Optimizing Inspections with Analytics,” <https://chicago.github.io/food-inspections-evaluation/> (accessed November 21, 2020); Robert Sullivan, “Innovations in Identifying People Who Frequently Use Criminal Justice and Healthcare Systems,” *Policy Research Associates*, May 16, 2018, <https://www.prainc.com/innovations-identification-cj-healthcare/>; Harvard Kennedy School, Data-Smart City Solutions, “A Catalogue of Civic Data Use Cases: How Can Data and Analytics Be Used to Enhance City Operations?” October 9, 2019, <https://datasmart.ash.harvard.edu/news/article/how-can-data-and-analytics-be-used-to-enhance-city-operations-723>; and University of Pennsylvania, “Uses in Government,” <https://www.law.upenn.edu/institutes/ppr/optimizing-government-project/government.php#municipal> (accessed November 21, 2020).
- <sup>10</sup> Dan Hurley, “Can an Algorithm Tell When Kids Are in Danger?” *The New York Times Magazine*, January 2, 2018, <https://www.nytimes.com/2018/01/02/magazine/can-an-algorithm-tell-when-kids-are-in-danger.html>.
- <sup>11</sup> See Coglianese and Ben Dor, “AI in Adjudication and Administration.”
- <sup>12</sup> See Tim Lau, “Predicting Policing Explained,” *Brennan Center for Justice*, April 1, 2020, <https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained>.

- <sup>13</sup> See Shirin Ghaffary and Rani Molla, “Here’s Where the U.S. Government Is Using Facial Recognition Technology to Surveil Americans,” Vox, December 10, 2019, <https://www.vox.com/recode/2019/7/18/20698307/facial-recognition-technology-us-government-fight-for-the-future>.
- <sup>14</sup> See Tod Newcombe, “Aiming Analytics at Our \$3.5 Billion Unemployment Insurance Problem,” Government Technology, March 2017, <https://www.govtech.com/data/Aiming-Analytics-at-Our-35-Billion-Unemployment-Insurance-Problem.html>.
- <sup>15</sup> See David Freeman Engstrom and Daniel E. Ho, “Algorithmic Accountability in the Administrative State,” *Yale Journal on Regulation* 37 (3) (2020): 800, 815–819; and Richard Rubin, “AI Comes to the Tax Code,” *The Wall Street Journal*, February 26, 2020, <https://www.wsj.com/articles/ai-comes-to-the-tax-code-11582713000>.
- <sup>16</sup> Partnership for Public Service and IBM Center for the Business of Government, *More Than Meets AI: Assessing the Impact of Artificial Intelligence on the Work of Government* (Washington, D.C.: Partnership for Public Service and IBM Center for the Business of Government, 2019), <https://ourpublicservice.org/wp-content/uploads/2019/02/More-Than-Meets-AI.pdf>.
- <sup>17</sup> Such tenets are reflected in both the notion of due process as well as the general standard that agency action should not be arbitrary and capricious.
- <sup>18</sup> See Coglianese and Lehr, “Transparency and Algorithmic Governance,” 26–29.
- <sup>19</sup> 462 U.S. 87, 103 (1983).
- <sup>20</sup> 490 U.S. 360, 371 (2011), quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).
- <sup>21</sup> See Coglianese and Lehr, “Transparency and Algorithmic Governance,” 49–55.
- <sup>22</sup> 463 U.S. 29 (1983).
- <sup>23</sup> Validation, which should take place before abandoning the status quo of a human-based process, could involve testing the algorithm on randomly selected cases that are also, in tandem, decided by humans following normal procedures. Closer scrutiny could be provided by panels of human experts of discrepancies between the results of digital systems and the initial human decision-makers.
- <sup>24</sup> This regulatory review regimen is outlined in Executive Order 12866 of September 30, 1993, *Federal Register* 58 (190) (1993).
- <sup>25</sup> 467 U.S. 837 (1984). As a formal matter, the Court grounded *Chevron* deference in an explicit or implicit delegation of clarifying or gap-filling authority to the agency. See Cary Coglianese, “*Chevron*’s Interstitial Steps,” *The George Washington Law Review* 85 (5) (2017): 1339, 1347–1351.
- <sup>26</sup> 467 U.S. 837, 865.
- <sup>27</sup> Benedict Carey, “Can an Algorithm Prevent Suicide?” *The New York Times*, November 23, 2020, <https://www.nytimes.com/2020/11/23/health/artificial-intelligence-veterans-suicide.html>.
- <sup>28</sup> *Ibid.*
- <sup>29</sup> For a discussion of the intelligible principle doctrine, see Cary Coglianese, “Dimensions of Delegation,” *University of Pennsylvania Law Review* 167 (7) (2019): 1849.
- <sup>30</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

- <sup>31</sup> See *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and Coglianese and Lehr, “Regulating by Robot.”
- <sup>32</sup> For an accessible account of technical aspects of algorithmic fairness, see Michael Kearns and Aaron Roth, *The Ethical Algorithm: The Science of Socially Aware Algorithm Design* (New York: Oxford University Press, 2019), 57–93. For a cogent discussion of how digital algorithms can generate results more fair than human processes, see Sandra G. Mayson, “Bias In, Bias Out,” *Yale Law Journal* 128 (8) (2019): 2218, 2277–2281.
- <sup>33</sup> See, for example, Richard A. Berk and Arun Kumar Kuchibhotla, “Improving Fairness in Criminal Justice Algorithmic Risk Assessments Using Conformal Prediction Sets,” (2021), arXiv:2008.11664 [stat.AP]; James E. Johndrow and Kristian Lum, “An Algorithm for Removing Sensitive Information: Application to Race-Independent Recidivism Prediction,” *The Annals of Applied Statistics* 13 (1) (2019): 189; and Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan, and Cass R. Sunstein, “Discrimination in the Age of Algorithms,” *Journal of Legal Analysis* 10 (2018): 113.
- <sup>34</sup> See, for example, Danielle Keats Citron, “Technological Due Process,” *Washington University Law Review* 85 (6) (2008): 1249; and Karen Yeung, “Algorithmic Regulation: A Critical Interrogation,” *Regulation and Government* 12 (4) (2018): 505.
- <sup>35</sup> For example, norms will surely develop about how agencies should document their choices in designing algorithmic systems. See, for example, Timnit Gebru, Jamie Morgenstern, Briana Vecchione, et al., “Datasheets for Datasets” (2020), <https://arxiv.org/abs/1803.09010>.
- <sup>36</sup> Channeling Voltaire, if *Baltimore Gas & Electric* did not exist, courts might still find it necessary to invoke its deference. See Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Cambridge, Mass.: Harvard University Press, 2016).
- <sup>37</sup> As Steven Appel and I have noted elsewhere, “it is not hard to imagine a time in the near future when the public actually comes to expect their public servants to rely on such technologies. As complex machine-learning algorithms proliferate in the private sector, members of the public may well come to expect similar accuracy and automated services from their governments.” Steven M. Appel and Cary Coglianese, “Algorithmic Governance and Administrative Law,” in *Cambridge Handbook on the Law of Algorithms: Human Rights, Intellectual Property, Government Regulation*, ed. Woodrow Barfield (Cambridge: Cambridge University Press, 2021), 162, 165.
- <sup>38</sup> Notably, technologists are even exploring the possibility of building empathy into automated tools. See, for example, Pascale Fung, Dario Bertero, Yan Wan, et al., “Towards Empathetic Human-Robot Interactions,” in *Computational Linguistics and Intelligent Text Processing*, ed. Alexander Gelbukh (New York: Springer International Publishing, 2018).
- <sup>39</sup> Kai-Fu Lee, *AI Superpowers: China, Silicon Valley, and the New World Order* (New York: Houghton Mifflin Harcourt, 2018), 210.
- <sup>40</sup> The advent of an automated administrative state will unquestionably lead to changes in the government labor force, much as the expanded use of artificial intelligence in the private sector will lead to changes in the labor market more generally. David Autor and Anna M. Salomons, “Is Automation Labor-Displacing? Productivity Growth, Employment, and the Labor Share,” *Brookings Papers on Economic Activity*, March 8, 2018; and David Autor, David Mindell, and Elisabeth Reynolds, *The Work of the Future: Building Better Jobs in an Age of Intelligent Machines* (Cambridge, Mass.: MIT Work of the Future, 2020),



<https://workofthefuture.mit.edu/wp-content/uploads/2021/01/2020-Final-Report4.pdf>. The shift to a government workforce increasingly organized around empathy harkens to a broader shift from a manufacturing economy to service economy, or perhaps still further to a “sharing” economy. See Cary Coglianese, “Optimizing Regulation for an Optimizing Economy,” *University of Pennsylvania Journal of Law and Public Affairs* 4 (1) (2018): 3–4.

<sup>41</sup> Partnership for Public Service and IBM Center for the Business of Government, *More Than Meets AI*, 8.

<sup>42</sup> Allen E. Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (New York: Springer International Publishing, 1988).

<sup>43</sup> Amanda Greene, “Competence, Fairness, and Caring: The Three Keys to Government Legitimacy,” Centre for Public Impact, February 27, 2018, <https://www.centreforpublicimpact.org/the-three-keys-government-legitimacy/>.

<sup>44</sup> 397 U.S. 254 (1970). See Lucie E. White, “Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.,” *Buffalo Law Review* 38 (1) (1990).

<sup>45</sup> 424 U.S. 319 (1976).

<sup>46</sup> “Social Security Awards Depend More on Judge Than Facts,” TRAC Social Security Administration, July 4, 2011, <https://trac.syr.edu/tracreports/ssa/254/>. The Social Security Administration sharply disputed aspects of this study.

<sup>47</sup> *Ibid.*

<sup>48</sup> See, for example, U.S. General Accounting Office, “Racial Difference in Disability Decisions Warrants Further Investigation,” B-247327 (Washington, D.C.: U.S. General Accounting Office, 1992), <https://www.gao.gov/assets/160/151781.pdf>; and Erin M. Godtland, Michele Grgich, Carol Dawn Petersen, et al., “Racial Disparities in Federal Disability Benefits,” *Contemporary Economic Policy* 25 (1) (2007): 27.

<sup>49</sup> For a discussion of the importance of empathy in the exercise of regulatory authority, see Cary Coglianese, *Listening, Learning, and Leading: A Framework for Regulatory Excellence* (Philadelphia: University of Pennsylvania Law School, 2015), 23–25, <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf>.

<sup>50</sup> For an excellent treatment of this question, see Aziz Z. Huq, “A Right to a Human Decision,” *Virginia Law Review* 106 (3) (2020): 611.

<sup>51</sup> Sometimes the compassionate response may even call for overriding an automated decision: that is, to have a human official exhibit mercy and reach a different decision on an individual basis. After all, automated systems themselves will still result in errors, and joint human-machine systems may well at times do better to reduce errors than either humans or machines operating separately. The challenge, though, will be to ensure enough structure around the discretion to override automated outcomes, lest human exceptions come to swallow automated rules. See Cary Coglianese, Gabriel Schefler, and Daniel E. Walters, “Unrules,” *Stanford Law Review* 73 (4) (2021): 885. One solution might be to create automated systems specifically designed to help with this very problem. If an automated system generates not only an outcome but also an estimate of confidence in that outcome, humans may be guided to go beyond empathic listening and deliver merciful exceptions only in those instances where a system’s estimated confidence is sufficiently low.

# The Innovative State

*Beth Simone Noveck*

*To create government that is neither bigger nor smaller but better at solving problems more effectively and legitimately, agencies need to use big data and the associated technologies of machine learning and predictive analytics. Such data-analytical approaches will help agencies understand the problems they are addressing more empirically and devise more responsive policies and services. Such data-processing tools can also be used to make citizen engagement more efficient, helping agencies to make sense of large quantities of information and invite meaningful participation from more diverse audiences who have never participated in our democracy. To take advantage of the power of new technologies for governing, however, the federal government needs, first and foremost, to invest in training public servants to work differently and prepare them for the future of work in a new technological age.*

**D**uring the COVID-19 pandemic, I have had the privilege to lead a team of engineers, designers, and policy professionals in the New Jersey Office of Innovation, a recently created administrative unit in the state's government. When the pandemic hit, the Innovation Office team used technology and data, and unprecedented levels of collaboration across agencies and with the private sector, to respond to the crisis.

Working with the nonprofit Federation of American Scientists, for example, we built a website and accompanying (Amazon) Alexa skill to enable the public to pose questions about the virus to more than six hundred participating scientists and receive rapid, well-researched responses.<sup>1</sup>

A private sector company lent us the tech and the talent to create a website, covid19.nj.gov, in three days. In the last year, the site has been visited more than seventy-five million times since its launch in March of 2020.

Even more challenging to create than the technology was the content. Therefore, the Innovation Office collaborated with Princeton, Rutgers, Montclair, Rowan, and the state's other universities to create an editorial team to translate legalese from government agencies into plain English and to knit together disparate sources of information in a single website.

A professor of data science at New York University assembled a team to produce predictive analytics about the spread of the virus. This data enabled the governor and other senior leaders to make better decisions about the response. When

the data science team could not determine the number of deaths on the basis of race because the testing labs were not providing that information, the Department of Human Services and the Department of Health shared key administrative data with one another that enabled us to answer this question faster. Such sharing would normally be accomplished in a year (or never); we did it in a day.

In three days, the team also produced the nation's first state jobs site to list available positions in essential businesses and thereby mitigate the crisis of unemployment. We posted over fifty thousand jobs in a broad range of businesses and salary levels. We launched a site that was far from perfect and improved it as we went along, knowing it was more important to risk failure than not to act quickly. Our team also worked with the federal government's Digital Service, a unit within the Executive Office of the President, to fix the state's process of certifying for unemployment.<sup>2</sup> We also worked with the nonprofit Code for America to digitize the application process for food benefits, whose paper-based rules previously required coming into a government office to demonstrate income level.

By working more collaboratively and taking advantage of new technologies of information collection, analysis, and visualization, we were able to demonstrate how a bureaucracy can be nimble and effective, rather than lumbering and unresponsive.

Changing how we work in government is imperative. The COVID-19 crisis has revealed how ill-equipped the administrative state is at dealing with novel challenges. From delivering adequate testing and personal protective equipment (PPE) to expanding online education equitably, in too many areas the state has struggled to respond.

Perhaps it is telling that, in the face of the unprecedented COVID crisis, many public leaders chose to hire the management consultancy McKinsey and outsource critical state responses despite the high costs.<sup>3</sup> In the first four months of the pandemic alone, public institutions in the United States contracted with McKinsey to the tune of \$100 million, reflecting, at best, a perceived lack of confidence in the skills of bureaucracies and, at worst, a hollowing out of competence in the administrative state.<sup>4</sup> Either way, there is an urgent need for new approaches to how government operates in response to the crises hiding in plain sight, from the public health emergency to an unprecedented economic depression. In the United States in 2020, joblessness reached numbers not seen since the Great Depression. The International Monetary Fund (IMF) has estimated that the global economy shrunk by 3.5 percent in 2020, pushing many of those who could least afford it deeper into poverty.<sup>5</sup>

While the economy is showing signs of bouncing back and vaccines are helping to alleviate the public health emergency, the crisis of confidence in government is chronic, not acute, because the challenges we face are not going away. Inequality persists. Pre-COVID, the average worker had not seen her wages increase

since the 1970s, while the average pretax income of the top 10 percent of American earners has doubled since 1980, and that of the top 0.001 percent rose sevenfold.<sup>6</sup> Whereas life expectancy in the United States continuously increased for most of the past sixty years, it has been decreasing since 2014.<sup>7</sup> For the poor, life expectancy is dramatically lower.<sup>8</sup> Rich American men now live fifteen years longer than their poorer compatriots.<sup>9</sup> Life expectancy for Black men is far below every other demographic.<sup>10</sup> On top of these and countless other challenges, there is the looming and existential threat of climate change.

It is no wonder that most Americans today have lost confidence in government, especially the federal government. According to Pew Research Center, only 2 percent of Americans today say they can trust the government in Washington to do what is right “just about always,” while 18 percent trust the federal government “most of the time.”<sup>11</sup> Political scientist Paul Light has asserted that “federal failures have become so common that they are less of a shock to the public than an expectation. The question is no longer if government will fail every few months, but where. And the answer is ‘anywhere at all.’”<sup>12</sup>

**I**f embraced, the right technologies can create new opportunities for improving the efficacy and agility – and, when used well, the legitimacy – of the administrative state. The technologies of big data as well as those engagement tools that enable individual and group communication and collaboration across a distance – what we might call the technologies of collective intelligence – could enable government agencies to understand problems with greater precision and in conversation with those most affected.

Thanks to the ubiquitous presence of data-gathering sensors in our lives, the technologies of big data make it possible for bureaucrats to gather more: more real-time and more granular information. Instead of speculating about the cause of accidents, for example, a city now has exact information generated by the sensors on traffic lights, road cameras, and even sensors built into the pavement revealing exactly what kind of accidents are happening, when they occur, and which vehicles they involve. Data-analytical tools like machine learning make it possible for machines to ingest and make sense of large quantities of data. They can help the administrative state analyze the new glut of information.

Agencies have the opportunity to get smarter from people – their experiences and expertise – as well as from sensors and to obtain more diverse and equitable perspectives and insights. These combinations of quantitative and qualitative approaches tell agency officials more about why a problem is occurring and offer a broader audience to provide solutions.

The administrative agencies of government at every level have always had far greater access to information than other branches of government.<sup>13</sup> This is why legal scholar Adrian Vermeule refers to the administrative state as the “sensory

organ” of government. Its agencies and large staffs are designed to “gather, examine and cull information” and make greater sense of on-the-ground conditions.<sup>14</sup> Technology in every era has enabled administrative agencies to engage in “seeing like a state,” in the famous phrase of political scientist James Scott (and his eponymous book). Whereas Scott was concerned about the tendency of those who govern toward reductive simplification due, in large part, to simplistic measurement tools, entrepreneurial bureaucrats today have the opportunity to use big data *and* human insight to understand a problem as ordinary people experience it, and to design collaboratively more-effective solutions tailored to achieving the public’s desired outcomes.

If we embrace these diverse sources of external knowledge, the epistemic capacity of the state has the potential to increase dramatically. In fact, in 2018, Congress passed the Foundations for Evidence-Based Policymaking Act, requiring agencies to make better use of their data to measure and improve their performance and policy-making.<sup>15</sup> But, on the whole, too many administrative agencies are still falling behind in their use of new technologies and innovative ways of working. There is an ongoing information asymmetry in that regulators lack access to the data, information, and insight they need to safeguard the public interest, deliver services, identify violations, and enforce the law efficiently, especially vis-à-vis those seeking to evade liability. They also lack the practices for solving problems collaboratively. For agencies to engage in transformative policy-making, they need to exploit the tools available for creating a “smarter” and more equitable state.

**B**ig data refers to extremely large data sets that are too big to be stored or processed using traditional means. Today, new collection, storage, transmission, visualization, and analytic techniques have triggered a massive proliferation of data sets collected by public and private entities about everything from health and wellness to phone and purchase records. Such data are powerful raw materials for problem-solving.

Take a recent example from New Orleans, which has one of the highest murder rates of any city in the nation. Determined to change this dismal fact, then Mayor Mitch Landrieu in 2012 created a unit in city government called the Innovation Team, or i-Team. Using more than fifty years of data grouped by neighborhood and by rates of murder, crime, educational attainment, unemployment, and recidivism, the team uncovered a significant correlation between unemployment and violent crime (and thus recidivism). The data showed that a small and identifiable set of people in a few neighborhoods committed a majority of murders, usually as the result of petty disputes.<sup>16</sup>

That knowledge produced significant change. Municipal agencies instituted programs to train and hire ex-offenders in an effort to reduce the likelihood of re-

offending among those who had been incarcerated.<sup>17</sup> Strategies in the NOLA for Life program included social services and job opportunities as well as threats of prosecution, using data to determine which approach was appropriate for which individual. In the i-Teams' first year, the New Orleans' murder rate dropped 19 percent. Two years in, the rate had dropped over 25 percent from the 2012 high. New Orleans' murder rates in 2018 and 2019, though still among the highest in the country, were at their lowest level in almost fifty years.<sup>18</sup>

There has been a significant push in recent years to increase the amount of data that administrative agencies collect from the entities they regulate to enable more targeted regulatory enforcement. In 2010, for example, the Occupational Safety and Health Administration (OSHA) required certain employers to submit death and injury data electronically to Washington and, as a result, OSHA was able to build a dashboard showing where injuries were occurring. (This data collection rule was scrapped by the Trump administration in 2019, though on day one of his administration, President Biden reversed course again.)<sup>19</sup> In July 2010, Congress passed and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which among other things created the Consumer Financial Protection Bureau (CFPB). The CFPB created a public complaint database in an effort to pressure businesses to treat customers better. Like OSHA, this agency also collected more data in machine-readable format to be able to create the Student Debt Repayment Assistant, an online tool to help borrowers navigate student loan repayment options.<sup>20</sup> Similarly, in 2015, the CFPB issued a rule to expand data collection requirements under the Home Mortgage Disclosure Act to help protect borrowers. (This rule, too, was effectively gutted by the Trump administration, which eliminated penalties for noncompliance. Joe Biden campaigned on a commitment to undo Trump's actions.)<sup>21</sup>

Many describe what makes big data *big* as the “3Vs”: *volume*, *velocity*, and *variety*. First, the term reflects a huge rise in data volume. In 2015, 12 zettabytes – that's  $12 \times 10^{21}$  bytes of data – were created worldwide. By 2025, that number is forecast to reach 163 zettabytes. For comparison, the entire Library of Congress is only 15 terabytes: 1 zettabyte is 1 billion terabytes. Second, data velocity – the speed at which data are generated, analyzed, and used – is increasing. Today, data are generated in near real-time, created by humans through myriad everyday activities like making a purchase with a credit card, logging onto social media, or adjusting a thermostat, and by machines through radio-frequency identification (RFID) and sensor data. Much of these data are “designed data,” collected for statistical and analytical purposes. But large quantities of data are also “found data” (also known as “data exhaust”), collected for something other than research but still susceptible to analysis.<sup>22</sup> For example, the JPMorgan Chase Institute uses financial services data, including credit card purchase records, to analyze and comment on the economic future of online platforms such as Uber and Lyft.<sup>23</sup> Third, big data reflects accumu-



lating data variety. Data come in many formats, including numbers, text, images, voice, and video. Some data are organized in traditional databases with predefined fields such as phone numbers, zip codes, and credit card numbers. However, more and more data are unstructured: they do not come preorganized in traditional spreadsheet-style formats but helter-skelter as Twitter postings, videos, coordinates, and so forth. Nevertheless, contemporary analytical methods make it possible to search, sort, and spot patterns even in unstructured data.

The value of all this data collection for the administrative state is in the ability to understand past, present, and future actions.<sup>24</sup>

With the right data-analytical skills – namely, an understanding of how to formulate a hypothesis, identify and collect the right data, and use that data to confirm the hypothesis – policy-makers can understand *past* performance of public policies and services, evaluating both their efficiency and impact on different populations. Economists Raj Chetty, Nathaniel Hendren, and Lawrence Katz studied twenty years of income records from families that moved to new neighborhoods using the Housing Choice Voucher Program. They discovered that these families earned significantly higher incomes, completed more education, and were less likely to become single parents than peers who stayed in their neighborhoods. Citing this research, the Department of Housing and Urban Development overhauled the formula that it had used for four decades to calculate rental assistance, and increased opportunities for families to move from high-poverty areas to low-poverty areas.<sup>25</sup>

Larger quantities of data also enable the delivery of more-tailored interventions in the *present* by helping governments match people to benefits to which they are entitled or to assistance they need. For example, Louisiana’s Department of Health uses Supplemental Nutrition Assistance Program (SNAP) enrollment data to sign people up for health benefits. Of nearly 900,000 SNAP recipients, Louisiana has enrolled 105,000 in Medicaid without a separate application process, relying on a four-question, yes-or-no survey to determine eligibility. This approach has helped some of the state’s poorest residents get access to benefits, while saving the state about \$1.5 million in administrative costs.<sup>26</sup>

Better access to data even helps with forecasting *future* outcomes, such as who is likely to be a frequent visitor to the emergency room, thereby enabling more targeted interventions and treatment. During the COVID-19 pandemic, many jurisdictions started using “symptom trackers,” simple software tools to enable people to report their symptoms to public health officials. (In New Jersey, we created our own, and half a million participants used it to report data and obtain information.) Especially in the absence of testing data, symptom trackers provided an early warning mechanism, signaling where people were complaining of coughs and fevers. Symptom tracker data enabled emergency officials to anticipate the need for equipment, supplies, and hospital beds in the not too distant future.

Big data also creates the opportunity for regulators to spot mistakes, outliers, and rare events and make decisions based on evidence of on-the-ground conditions. For example, rat infestations in large cities are difficult to tackle because rats travel in virtually unpredictable ways. Chicago's rat problem peaked in 2011 when it received more than twenty-five thousand rodent complaints via 311 calls (notifications from residents about problems needing attention). This call center information generated a novel database that offered a deeper understanding of the day-to-day patterns of rat infestations. In search of a new strategy, the city partnered with Carnegie Mellon University's Event and Pattern Detection Lab to gather twelve years of 311 citizen complaint data, including information on rat sightings along with related factors such as overflowing trash bins, food poisoning cases, tree debris, and building vacancies. It is important to point out that these data are not gathered by regulators but by citizens calling the city's hotline. The 311 system "constructs a collaborative relationship between city residents and government operations," writes public affairs scholar Daniel T. O'Brien. "Residents act as the 'eyes and ears of the city,' reporting problems that they observe in their daily movements."<sup>27</sup>

**F**rom cuneiform to card catalogs, governments have always recorded data. But the proliferation of big data creates hopeful new opportunities for innovation in the administrative state. Big data makes it possible for agencies to increase their epistemic and sensory capacity and develop a more detailed and accurate understanding of on-the-ground conditions with the engagement of a more diverse public.

These data-analytical techniques have made possible an expanded toolkit for change and new kinds of solutions from regulatory agencies, such as "smart disclosure" tools that aim to give consumers more complete data about the cost, quality, and safety of the products and services they buy, or the health, environmental, and labor practices of manufacturers and service providers.<sup>28</sup> For example, the Department of Education's College Scorecard gives students and parents information about the real costs, financial aid options, graduation rates, and postgraduation salaries and employment opportunities of universities. In New Jersey, we are building Data for the American Dream, a similar initiative to provide transparency about vocational training programs to job seekers, and especially unemployed job seekers, to help them make more-informed decisions about cosmetology, welding, and green energy training programs, for example. Using anonymized government-collected tax data, this "training explorer" will be able to show whether those who took a given training course saw their income go up or down.

To be sure, as legal scholar Rory van Loo has pointed out, there can be drawbacks in the use of smart disclosure tools like Training Explorer, College Scorecard, the Affordable Care Act's health insurance exchange websites, or the CFPB's

mortgage rate checker tool: when under-resourced public agencies build worse websites than Silicon Valley, consumers suffer. At the same time, outsourcing the development of these tools to the private sector has its own problems. The IRS contracted with Intuit to provide a free version of TurboTax to low-income residents for their tax preparation, but the company has allegedly made that version as bad as possible to pressure people to buy its expensive products.<sup>29</sup>

**M**achine learning (a subset of artificial intelligence, or AI) describes a set of analytical techniques for *using* big data to make sense of and predict future occurrences and could radically transform the ability of agencies to deliver services and make informed policies.<sup>30</sup> Machine learning teaches computers to learn using training data sets. Familiar home assistants like Siri, Alexa, and Google Home are all powered by machine learning. They learn from earlier questions to understand and answer new questions. In other words, with machine learning, a computer learns by example rather than through explicit programming instructions, opening up a vast array of new possibilities for administrative interventions.

Machine learning takes many forms. The most common, “supervised machine learning,” is akin to how a teacher trains a child in arithmetic. The conclusions are known, and the teacher shows her how to arrive at them. Similarly, in supervised machine learning, the outputs are known and used to help develop an algorithm to reach that conclusion. Using large quantities of labeled data (and there is an ever-expanding number of labeled data sets available on the Internet), machine learning can uncover patterns and inductively create general rules. For example, MIT researchers used machine learning to analyze the cough patterns of more than five thousand people and used that data set to develop an algorithm that can diagnose COVID-19, and researchers at Stanford looked at a training data set of cancerous moles to devise a tool that could diagnose skin cancer.<sup>31</sup> (To be clear, machine learning based on large-scale raw data sets, while potentially an improvement over human diagnostics in some cases, is still error prone.)

The learning in machine learning occurs when the machine turns the data into a model. Models make us smarter, writes political scientist Scott Page. “Without models, people suffer from a laundry list of cognitive shortcomings: we overweight recent events, we assign probabilities based on unreasonableness, and we ignore base rates. . . . With models, we clarify assumptions and think logically. From power laws to Markov models, such heuristics give us simple ways to test our hypotheses.”<sup>32</sup> Increasingly, there are also techniques for unsupervised machine learning that can find patterns in large quantities of unstructured data.

Machine learning could transform the workings of the public sector. It can make it possible to target scarce enforcement resources more effectively. For example, Chicago has more than fifteen thousand food establishments, but only three dozen inspectors. Working in collaboration with Carnegie Mellon Univer-

sity, Chicago's city government used its data on restaurant inspections and a wide variety of other data to create an algorithm to predict food-safety violations. This project increased the effectiveness of its inspections by 25 percent. Chile's Labor Inspectorate is applying machine learning to analyze past accidents and thereby anticipate workplace safety violations to make inspections more efficient and targeted. The Department of Education is exploring how machine learning and other technologies could be used to bring down the cost and improve the quality of creating learning assessments by automating the process of creating questions, scoring responses, and obtaining insights.<sup>33</sup>

By making it possible to sort the extraneous chaff from the informational wheat, machine learning could enable agencies to deliver both new and better services to the public. But it can also enable agencies to engage a broader public in decision-making by helping agencies to make public engagement more efficient. The public has long had a right to comment on any proposed agency regulatory rulemaking thanks to the Administrative Procedure Act of 1946. Although many of the three or four thousand rulemaking agencies publish annually receive only a handful of comments, thanks to the ease of digital commenting, some receive voluminous responses. In 2017, when the Federal Communications Commission sought to repeal an earlier Obama-era "net neutrality" rule requiring Internet service providers to transmit all content at the same speeds and not discriminate in favor of one content provider or another, the agency received twenty-two million comments.<sup>34</sup> In 2007, the Fish and Wildlife Service received more than 640,000 email comments on whether to list the polar bear as a threatened species.<sup>35</sup>

While, in principle, it is good for democracy when more people participate in rulemaking, the reality is that the large volume of comments – many of which are "written" by software algorithms or are the result of electronic mass comment campaigns – also makes it hard for agencies to read or use the material and renders the public's engagement mere "democracy theater." But if agencies used machine learning to summarize and analyze comments, they could better understand public participation and increase the epistemic value of engagement. Tools already exist for rapid de-duplication of identical comments and summarization of unique comments.<sup>36</sup> Journalists took advantage of such tools, for example, when they needed to sift rapidly through the 13.4 million documents that made up the Paradise Papers.<sup>37</sup> Both Google and Microsoft announced in 2019 that they had built systems that could summarize articles.<sup>38</sup>

While not yet in widespread use in federal agencies, data-analytical techniques have begun to be used to make sense of citizen input in some contexts. A recent State Department project offers a simple illustration for how agencies could take a more effective approach to making sense of rulemaking comments using a combination of artificial intelligence from machines and collective intelligence (CI) from humans. In 2016, the State Department sought to improve its passport appli-

cation and renewal process in anticipation of an increase in the number of passport application and renewal forms. The Department ran an online public engagement process to ask people what improvements they wanted. It received almost one thousand comments and engaged an Israeli-American software company to help it make rapid sense of the submissions.<sup>39</sup>

First, commenters were asked to highlight the key points of their answers. For users who declined to do so, the platform encouraged other users to highlight what they felt to be the other users' core ideas. Then the company applied a text-mining algorithm that scanned the highlighted text for responses containing similar keywords in order to create summaries, or what the company calls "highlights." Not surprisingly, the public was clamoring for a more convenient application process.

While machine learning can make it easier to process large quantities of comments, there are also challenges inherent in using machine learning precisely because of the way it creates generalizable rules. If a machine learning algorithm is "fed" with bad or incomplete data, it will encode bias into the model.<sup>40</sup> For example, large companies use machine learning tools (sometimes known as "automated employment decision tools" or "algorithmic hiring tools") to conduct and score video-based applicant interviews. This reduces the costs of screening potential employees. But if machine learning is used to compare applicant responses with interview answers provided by current employees, and if current employees are mostly White and American-born, applicants who are Black or foreign-born will score poorly.<sup>41</sup> Nonetheless, if applied to foster democratic engagement, these tools can help agencies get "smarter," faster, from new, more diverse audiences.

**T**he late nineteenth and early twentieth centuries saw the rise of the professions – medicine, law, engineering, and social sciences – and of the civil service. To overcome the cronyism of the past, under the Pendleton Reform Act of 1883, professional civil servants had to qualify based on an examination. Rules and procedures were put in place to create a culture of independence and the tradition of working behind closed doors emerged. Governing, especially in expert agencies, was meant to be at arm's length from the people.<sup>42</sup> Institutions and bureaucracies were designed to be hierarchical and rules-based, in order to support the new vision of the public servant as an impartial mandarin shielded from undue influence. This culture of isolation persists today. Mike Bracken, former head of the UK Government Digital Service, writes about the British civil service: "Whitehall was described to me when I started as a warring band of tribal bureaucrats held together by a common pension scheme."<sup>43</sup>

As we saw with public 311 data about rats, thanks to the technologies of collective intelligence – those Internet-based tools that connect networks of people to one another for deliberation, data-gathering, collaborative work, shared decision-making, and collective action – the public is capable of playing an increasingly

collaborative role in governance. As Geoff Mulgan explains in *Big Mind: How Collective Intelligence Can Change Our World*, “every individual, organization or group could thrive more successfully if it tapped into . . . the brainpower of other people and machines.”<sup>44</sup> Humans, aided by machines, are smarter acting together than alone. They are able to collect and share the information needed to solve problems better. The technologies of collective intelligence create the opportunity to innovate and improve on the traditional regulatory rulemaking commenting process by enabling agencies to get more relevant information, especially from those who have not traditionally participated. Collective intelligence technologies do not refer to specific products but to a field of research and an ever-growing set of participatory methods and tools.

Diversifying engagement in the administrative state is especially important because rulemaking – like civic participation generally – does not attract diverse perspectives. Legal scholar Cynthia Farina has explained that regulated entities tend to be more represented in rulemakings than regulatory beneficiaries. Studies by a variety of academics have found that business groups dominate the commenting process.<sup>45</sup> While there is still not enough empirical research on who participates, it appears that individuals all too rarely submit substantive comments, in the same way that freedom of information requests come far less often from investigative reporters or civic groups than from businesses.<sup>46</sup> We have no data on race and participation in regulatory rulemakings. Surveys undertaken by Pew Research Center in 2008 and 2012 found that civic engagement is overwhelmingly the province of the wealthy, White, and educated.<sup>47</sup> The design of the current notice-and-comment process exacerbates armchair activism and amplifies some voices at the expense of others with relevant expertise and experience to share that could inform regulatory rule writing.

But around the world, public institutions have sought to reverse the decline in democratic trust by using new technology to enable citizens to participate in law and policy-making processes, or what I term *crowdlaw*.

For example, in early 2020, before the pandemic, New Jersey’s Future of Work Task Force, which I chaired, used a “wiki survey” tool called All Our Ideas to engage workers in defining the challenges associated with the impact of technology on the future of worker rights, health, and learning. All Our Ideas is a free, open-source tool developed by Princeton sociologist Matt Salganik. The wiki survey tool was prepopulated with dozens of possible responses to the question: what is your greatest concern about the impact of technology on the future of work? Respondents were then asked to decide which, between two randomly selected statements, is more important to them. People select the response they prefer (or “I can’t decide” as a third answer) or they may submit their own response. People can answer as many or as few questions as they choose and, with enough people participating, the result is a rank-ordered list of the answer choices, yielding in-



sight into the issues of greatest concern. Over three weeks in February 2020, more than four thousand workers used the tool to engage about the impact of technology on the future of work and share their concerns, such as “unnecessary degree requirements for jobs have a bigger impact on low-income populations” or “costs of living – including medical, housing, and education costs – have risen over the last few decades.” In April 2021, the New Jersey Department of Education used the same technology to ask parents, students, and teachers about their priorities for schools. More than seventeen thousand participated in three weeks, resulting in greater understanding for policy-makers and the public of the priorities of students, teachers, and caregivers, and how they diverge.<sup>48</sup>

The wiki survey method of showing people two ideas and having them choose between them or submit a new idea has several practical benefits. It makes it harder to manipulate or game results. Respondents cannot manipulate which answer options they will see. In addition, because respondents must select one of two discrete answer choices from each pair (or add their own), this reduces the impulse to add new ideas unless there is something new to be said. New submissions can also be reviewed prior to posting to reduce duplication. Also, the need to pick one of two submissions helps with prioritizing ideas. This feature is particularly valuable in policy contexts in which finite resources make it helpful for agency officials to have some assistance extracting the most unique comments.

Wiki surveys are just one example of technologically enabled engagement. Other countries are turning to online collaborative drafting platforms to develop policies, rules, and laws with the public. In 2018, the German government used a free annotation platform to “expert source” feedback on its draft artificial intelligence policy.<sup>49</sup> The German Chancellor’s Office, working in collaboration with Harvard University’s Berkman Center for Internet and Society and the New York University Governance Lab was able to solicit the input of global legal, technology, and policy experts. Taiwan and Brazil are turning to technology to include citizens in drafting national legislation as well.<sup>50</sup> Using an annotation platform also made it possible for people to see one another’s feedback and create a robust dialogue, instead of a series of disconnected comments.

If agencies would genuinely like to ensure diverse citizen input in the rulemaking process, there are proliferating examples of participatory rulemaking – *crowd-law* processes – sprouting up around the world.

**T**aking advantage of new technology, whether big data, machine learning, or crowdlaw tools, to regulate, deliver services more effectively, and co-design laws, regulations and policies with the public needs to start with training public servants to work differently, imbuing those who govern with a new set of skills. Retraining, reskilling, and lifelong learning are crucial for thriving in the digital age, in which technology will transform every job, no less so in the pub-

lic sector than the private. *The Innovator's DNA: Mastering the Five Skills of Disruptive Innovators* explains that the ability to innovate is not innate, but a learned set of practices that can and must be taught if businesses are to thrive.<sup>51</sup> Yet for all the talk about investing in private sector training, we are not doing so nearly enough in the public sector. By failing to invest in teaching public servants how to use data and collective intelligence – quantitative and qualitative methods – we are failing to build the skill set of the twenty-first-century public servant.<sup>52</sup>

To create government that is not smaller or bigger but better, the public sector needs to nurture talent, invest in training, and foster the development of a new set of skills. British conservative politician and Minister for the Cabinet Office Michael Gove declared in a much-publicized speech in June 2020:

The manner in which Government has rewarded its workers for many years now has, understandably, prized cognitive skills – the analytical, evaluative and, perhaps, above all, presentational. I believe that should change. Delivery on the ground; making a difference in the community; practicable, measurable improvements in the lives of others should matter more.<sup>53</sup>

Unfortunately, the skills involving data and collaboration needed to make practicable, measurable improvements in the lives of others – defining problems, employing data-analytical thinking, using collective intelligence and other innovative ways of working – are not in widespread and consistent use in public services. A 2019 survey I conducted to assess the use of six innovative problem-solving skills by over four hundred local public officials in the United States shows that only half were using new data-analytical or engagement skills in their work.<sup>54</sup> The results were similar in Australia, where I worked with colleagues at Monash University to run a comparable survey of almost four hundred mid- to senior-level public servants about nine skills, from problem definition to research synthesis. Only one-third of these Australian bureaucrats, on average, used innovative problem-solving skills.<sup>55</sup> Tellingly, however, once people knew and used a skill, they applied it regularly in their work. But the application is scattershot, and the skills are not developed for taking a project from idea to implementation.

The public sector's failure to use creative problem-solving methods that take advantage of collective intelligence and data is widespread.<sup>56</sup> And when public servants are not getting trained to work differently, that is no wonder. The surveys showed that respondents had been trained in innovative skills like the use of data or collective intelligence only between 8 and 30 percent of the time.<sup>57</sup>

In the Trump administration, which was openly hostile to the civil service and even signed an executive order (E.O. 13957) giving the president the power to hire or fire civil servants at will, investing in public sector training and talent did not happen.<sup>58</sup> While the Biden administration is friendlier to the civil service and rescinded E.O. 13957, urgent priorities of fighting COVID, climate change, and racial

equity are drawing the most attention and resources, even though training people to work differently could help advance these important political goals. While the United States is not focusing on training, forward-thinking countries are investing heavily in training public servants in new skills. Argentina's Innovation Academy offers programs on human-centered design that reach thirty-six thousand public servants. Germany has launched the new *Digitalakademie* with government-wide courses in new ways of working and digital competencies. Canada's Busrides program offers podcasts about new technologies such as artificial intelligence and their application to governing aimed at the country's two hundred and fifty thousand public servants.

Ultimately, the future of the administrative state rests in the hands of people who must embrace new ways of working. Individuals drive the actions of institutions. Futurist and architect Buckminster Fuller likened the power of the individual change agent to the trim tab, the small rudder that moves a big ship.<sup>59</sup> If we want better government capable of responding to existential crises like climate change or inequality, we must invest in and train new leaders: passionate and innovative people who are determined to go beyond mere compliance to solve problems in new ways.

In addition to training, however, government at every level needs to recruit more people with digital and innovation skills. The Tech Talent Project is a non-profit effort by more than eighty technologists and former policy-makers to conduct a review of agency operations and recommend ways to innovate. They, too, emphasize that "agencies need leaders with modern technical expertise from Day One" and recommend appointing people with more tech savvy in key leadership roles as well as training existing personnel.<sup>60</sup> It is also key to promote the agile recruitment and hiring of a modern and diverse federal workforce, including hiring a new generation of public sector leaders (currently, only 155,000 out of 2.1 million federal workers are under thirty) and more people of color, to complement better efforts at training.<sup>61</sup> The overhaul of the Office of Personnel Management and the Office of Presidential Appointments to facilitate faster hiring and better training, together with the creation of a Chief People Officer or cabinet-level human capital position to oversee these efforts, would ensure a robust twenty-first-century federal workforce and that training becomes a priority for future governments.

We also need greater understanding of the talents already in place in the administrative state. While we have data about the age, gender, race, and disability status of federal public servants and know how imbalanced the distribution of leadership positions is, we know very little about public workers' current skill gaps. The federal government should conduct an in-depth diagnostic survey about the talent and competences of the current workforce to diagnose what people do and do not know and empirically determine whether they are using quali-

tative and quantitative techniques, new technologies, and data-driven research in how they work. Only by learning what people can do can government facilitate a data-driven and informed training and hiring strategy. A decade ago, for example, the World Bank developed SkillFinder to keep track of the skills and know-how of its employees and consultants to foster greater knowledge sharing.<sup>62</sup> The United States should follow the lead of Chile, which conducted a limited skills survey in 2017; Canada, which did so in 2018; and the German Federal Government, which is planning in 2021 to distribute the same innovation skills survey I ran among public officials in the United States and in Australia.

But in addition to training and talent, we need the technology itself. The General Services Administration (GSA) should execute blanket purchase agreements with appropriate technology vendors to make it easy for every agency to know which tools to use and how to access innovative new platforms, including AI, machine learning, and collective intelligence platforms. We can use the authority provided by the America Competes Act to host a competition on the federal government's challenge platform ([challenge.gov](https://challenge.gov)) to spur the creation of new tools designed specifically for regulatory agencies, such as platforms for summarizing comments or undertaking collaborative drafting. The Tech Talent project specifically recommends that, in 2021, the Biden administration prioritize building a modern data infrastructure to enable robust, secure sharing of data within agencies, between agencies, and with the American public. In addition to massive investment in technology infrastructure and funding for technology research, advances in new technology need to be translated into more modern government. The GSA should not give grants to fund private sector innovation without ensuring that those innovations are used by government, too.

Previously, I have written extensively about using new technology to connect federal agencies to experts in America's industries and universities to improve the level of understanding of science in federal agencies. In *Smart Citizens, Smarter State: The Technologies of Expertise and the Future of Governing*, I lay out in detail how the federal government could expand projects like [experts.gov](https://experts.gov) for connecting public servants to smart, outside help to obtain data, facts, opinions, advice, and insights from a much broader audience. In addition, technology can help to connect administrative agencies to ordinary people with lived experience and situational awareness. Appellate lawyer and public interest advocate David Arkush has proposed that administrative agencies adopt a citizen jury system that would empanel one thousand randomly selected citizens to provide oversight over agency decision-making. In a variation on Arkush's idea, Administrative Conference of the United States counsel Reeve Bull, building on an idea expressed earlier by the Jefferson Center in its work on citizen juries, has proposed creating citizen advisory committees: relatively small groups of citizens who would advise but not bind an agency. In Bull's model, participants would receive background materials gen-

erated by deliberative polling before their discussions. This is exactly what they do in Belgium, where random samples of ordinary citizens serve on legislative committees. Thanks to new technology, it is becoming cheaper and easier to connect with ever-larger quantities of people who can bring their expertise to bear.

**F**rom Toby Ord to Bill Gates to Stephen Hawking, there is no lack of doomsday prognosticators about the dangers of new technology, especially artificial intelligence. But the greatest risk for our democracy is not the longer-term future of hyper-intelligent machines. Rather, the risk right now is that administrative agencies will fail to innovate altogether and miss this opportunity to open the processes of governance to more data and more public engagement. While there may be a danger from machines wresting control from humanity down the line, right now we have an opportunity to put these tools to use to strengthen participatory democracy and transform the administrative state.

From the 2019 government shutdown, the longest in U.S. history, to the repeated insults (think “deep state” and “fire Fauci”), to undermining the work of vital agencies like the Food and Drug Administration, the Centers for Disease Control and Prevention, and the National Institute of Allergy and Infectious Diseases, the Trump administration’s approach to governing reflected an emphasis on loyalty to Trump over expertise and delivering results for the public. But the Biden administration will need to do more than roll back enacted regulations or rehire the people Trump fired on his way out the door. If officials are to take advantage of data and technology to enhance both the regulatory and service delivery functions of government, Washington has to: invest in broadscale training in digital, innovation, and public problem-solving skills across the federal enterprise; learn who works in government and understand their skills and performance; find the talent hiding in plain sight and take advantage of their innovative know-how; speed up the process of bringing in more diverse people to serve; and relax the rules and customs that prevent federal officials from exercising common sense and creativity. We can use technology and new ways of working to steer the ship of state toward a future in which the public sector works openly and collaboratively, informed by data and engagement. We can overcome our fears about becoming slaves to new technology by putting those same tools to work for us to create a stronger, more robust democracy and better government.

## AUTHOR'S NOTE

This essay draws from Beth Simone Noveck, *Solving Public Problems: How to Fix Our Government and Change Our World* (New Haven: Yale University Press, 2021).

## ABOUT THE AUTHOR

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# Deconstruction (Not Destruction)

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*The administrative state should be deconstructed. But that does not mean that the administrative state should be destroyed. Although some may use the word deconstruction in the colloquial sense of destroyed, its more technical definition is also more fitting: a close examination of a theory to reveal its inadequacies. That definition is a better fit because there is no real prospect that modern government will be radically overhauled, but there is very good reason to reexamine the administrative state's theoretical underpinnings and reform aspects of it that have not withstood the test of the time. This essay identifies where theory and practice diverge and offers solutions with realistic chances of adoption. The result should not be the destruction of the administrative state but rather the development of higher-quality federal policy.*

The Supreme Court is not about to declare most of the federal government unconstitutional. True, Stephen Bannon famously announced that the Trump administration sought the “deconstruction of the administrative state.”<sup>1</sup> Granted, that bold claim was followed by the confirmations of Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court, two noted “skeptics” of regulatory authority.<sup>2</sup> And yes, the Supreme Court will limit the power of agencies, at least somewhat. All of this is conceded. But none of these points threatens modern government. In reality, the justices will not make radical changes – and neither will anyone else. The administrative state is not on the chopping block.

The administrative state will, however, be reformed. Indeed, the process has already started. In just the last few years, the Court has weakened judicial deference to agency interpretations of law, barred career staff from choosing administrative law judges, and held that Congress cannot empower a single person to run an agency that exercises “significant executive power” unless that person can be fired at will by the president.<sup>3</sup> And that was before Justice Amy Coney Barrett joined the Court. These are real changes to the law governing agencies. But not all change is bad. In a number of key respects, the *administrative state* – the United States’ framework for governing agencies, largely devised in the 1930s and 1940s – is showing its age.<sup>4</sup> The types of reforms realistically on the table, moreover, should not enfeeble the federal government but may produce better policy in a fairer, more legitimate way.



In other words, we are witnessing the *deconstruction* of the administrative state, not its *destruction*. Although some critics, almost certainly including Bannon himself, no doubt use deconstruction in the colloquial sense of destruction or demolition, we instead should speak of deconstruction in its more technical sense of examining the administrative state to identify where theory and reality diverge and what can be done to fix it.<sup>5</sup> Deconstruction is overdue. In fact, if left unchecked, many agencies' problems may get worse.

**A** bit of background is helpful. Most important, you were most likely misinformed in grade school when you learned about how the federal government works. The more accurate story is that federal agencies – sometimes seemingly operating without much real political control (hence, the memorable image of a “headless fourth branch of government”) – create binding legal rules, investigate compliance with those rules, and then punish those whom agency officials believe have violated those agency-created rules. In other words, unelected agency officials at times essentially make law (like Congress), enforce law (like the president), and adjudicate law (like a court), all under the same roof. Indeed, the very same person may wear all three hats.<sup>6</sup> Nor are the stakes small. Many of the most controversial disputes in recent years – including over immigration, national Internet policy, and greenhouse gases – involve regulation, not legislation. The *Schoolhouse Rock* version of government is a gross oversimplification.

How have we ended up in a world in which federal agencies play such an outsized role? That is too big a question for this essay, but here is a quick (and simplified) stab.<sup>7</sup> Although there has always been fuzziness around where the powers of the three branches of the government begin and end, the role of agencies was relatively less pronounced for the first one hundred years or so of the republic. The standard story goes something like this: In 1887, Congress enacted the Interstate Commerce Act, generally regarded as “the first great federal regulatory statute.”<sup>8</sup> Rather than constantly setting and resetting railroad rates, Congress tasked the Interstate Commerce Commission (ICC) with that responsibility. Yet Congress also imposed strict procedural requirements on the ICC to prevent the agency from ruling by “administrative fiat.”<sup>9</sup> Agencies were “expected to implement, but not to develop, government policy and values.”<sup>10</sup>

This narrow understanding of regulatory power did not sync well with the Progressive Movement. Woodrow Wilson, for instance, urged replacing the “old” system of making policy with “a trained and thoroughly organized administrative service.”<sup>11</sup> Under this view as described by later scholars, an agency should not be “an ‘agent’ of the legislature but instead . . . an institution constituted by the legislature to use its [own] best judgment.”<sup>12</sup> This new approach was controversial because it departed from the traditional model (prompting legal concerns) and because many feared that agencies would not use discretion well (prompting pol-

icy concerns). Accordingly, critics of regulatory power demanded “safeguards” to prevent “arbitrary conduct,” even though safeguards, by their nature, preclude some of the potential benefits of expertise.<sup>13</sup>

The push for discretionary power reached its zenith in the New Deal. Building on the Progressives’ vision, the New Deal theory was that “expert professionals,” acting apolitically, can “ascertain and implement an objective public interest.”<sup>14</sup> This trust in expertise – a trust vigorously defended by James Landis, a prominent New Dealer, chair of the Securities and Exchange Commission, and dean of Harvard Law School – resulted in remarkable delegations of authority. The theory behind statutes like the National Industrial Recovery Act and its conferral of “authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition’”<sup>15</sup> was that “regulatory statutes can provide no more than the skeleton, and must leave to administrative bodies the addition of flesh and blood necessary for a living body.”<sup>16</sup> Especially beginning in the 1930s, the Supreme Court allowed Congress to delegate vast amounts of authority to agencies with little statutory direction about how the authority should be used, to impose limits on presidential interference with agency officials, and to empower agencies rather than courts to adjudicate alleged violations of some types of legal duties.<sup>17</sup>

The New Deal view of regulatory power did not survive the 1940s – at least not entirely. Although the New Deal model still had many supporters, critics argued “that biased agency officials exercised a lawless discretion against business.”<sup>18</sup> This political conflict culminated in the Administrative Procedure Act (APA) of 1946, one of the most important statutes in U.S. history. The APA – often referred to as the “bill of rights for the administrative state” – is a compromise.<sup>19</sup> The APA accepts robust agency discretion but also imposes a number of procedural requirements on how agencies use that discretion. For instance, agencies often must provide hearings, solicit comments from the public, and explain themselves. The APA thus embraces expertise but acknowledges that safeguards are necessary.<sup>20</sup>

Since 1946, federal courts (with a few exceptions) have been reluctant to challenge the administrative state as a constitutional matter and, in fact, have reiterated that agencies can make, enforce, and adjudicate law. At the same time, however, courts’ interpretations of the APA have evolved, sometimes in favor of safeguards on regulatory power (such as the requirement that agencies turn over their data and respond to material comments from the public) but sometimes to the benefit of agencies.<sup>21</sup> For example, the Supreme Court in 1984 created the *Chevron* deference, which requires courts to defer to an agency’s reasonable interpretation of the ambiguous statutes it administers, even if a court would interpret the statute differently.<sup>22</sup> *Chevron* – the “counter-*Marbury* [*v. Madison*] for the administrative state”<sup>23</sup> – is one of the most frequently cited cases in administrative law.<sup>24</sup> *Chevron* is premised on the idea that Congress implicitly wants agencies, rather

than judges, to resolve such ambiguities. Since 1984, the judiciary has often held that *Chevron* should be applied broadly, even going so far as to uphold an agency's interpretation that disagreed with a federal court's earlier interpretation.<sup>25</sup>

All the while, since at least the 1980s, presidents of both parties have taken greater control over the regulatory process, especially for agencies that are not "independent" from the president (but often, realistically, for the independent ones too).<sup>26</sup> White House controls may include substantive direction of what and how agencies regulate. The upshot of all of this is today's administrative state. Constitutionally, agencies are understood to have broad powers. Statutorily, however, there are limits on how they exercise those powers, although such limits have been both strengthened and weakened since 1946. And with the occasional exception of independent agencies, the White House often is heavily involved in all of it.

**W**ith that background in place, let's get down to business. The administrative state is important *and* imperfect. It has flaws. And these flaws flow from the theory upon which it is built. If agencies are staffed with technocratic experts who always know the public interest and pursue it, it may make sense to empower them and get out of the way. This is especially true if the safeguards we have in place are strong enough to prevent rare abuses of regulatory power. But if that rosy account of what motivates regulators, their ability, and the strength of the safeguards that the law has in place for them does not withstand scrutiny, then we have cause to worry. Unfortunately, we often have cause to worry.

To be sure, the "expertise" theory of administrative law contains much truth. Expertise *does* matter; good policy depends on good inputs, including sound science. And agencies are staffed with dedicated public servants with a great deal of professional training. Yet this theory is not *always* true.

First, real expertise does not always exist. Agency officials, acting with a veneer of expertness, may fall victim to "myopia, interest-group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion."<sup>27</sup> Part of the problem is that knowledge is so diffuse that even well-intentioned, hard-working regulators sometimes do not understand as much as they think they do.<sup>28</sup> Self-interest can also be difficult to overcome. The more complex a scheme, for instance, the more valuable specialized knowledge becomes to regulated parties, which fuels revolving doors.<sup>29</sup> Agencies may also cloak their decisions in complicated jargon because it makes it harder for nonspecialists to criticize their work.<sup>30</sup> And history teaches that it is difficult indeed to eliminate an agency.<sup>31</sup>

Second, the theory of policy-making as an objective science has fallen into disrepute. Just ask Justice Elena Kagan, who as a law professor pooh-poohed as "almost quaint" Landis's belief that there is a brooding "objective public interest" just waiting to be discovered.<sup>32</sup> In reality, how to exercise regulatory power, although (one hopes) *informed* by "science," also inherently "involve[s] value choic-

es and political judgment, thus throwing into question the legitimacy of bureaucratic power.”<sup>33</sup> This creates a puzzle: agencies have authority on the theory that they act in the public interest. But that “objective public interest” may not exist, or at least an agency may have no special insight into it. Because value judgments are inevitable, letting agencies call the shots is always going to be controversial. In such a world, you want *your* people running the agency – those who share *your* values.

These criticisms are not new. They were a key driver of the APA’s compromise. The APA contains safeguards precisely because Congress recognized that expertise can be a fallible concept. Agencies today, however, are much larger and regulate many more things. This growth in agency size and authority reflects at least in part increased social complexity: Wall Street, for instance, is now much more sophisticated than it was in 1946. Similar stories could be told about environmental science, medicine, and telecommunications, all of which are more complicated today. This growth also carries with it more opportunities for abuse.<sup>34</sup> And because agencies have wider portfolios and more resources, they also make more value judgments. All of this matters because the APA’s safeguards do not always scale well. Safeguards that may have worked for a smaller, less complicated administrative state do not necessarily work as well for a larger, more complicated one. We should not be surprised that a 1946 statute is a poor fit for 2021.

Unfortunately, the divergence between the theory of how the administrative state should work and the reality of how it does work is widening. Because Congress is less willing or able to enact major legislation (a consequence of political polarization), presidents of both political parties more vigorously use regulatory power for policy objectives. Kagan, for example, observed that once it became plain after 1994 that Congress would not cooperate with the White House on major initiatives, “Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals,” including “health care, welfare reform, tobacco, [and] guns.”<sup>35</sup> When Congress wouldn’t play ball, the White House used regulatory power to advance its policy objectives.

This use of agencies, however, is not limited to the Clinton administration; *all* modern presidents, Republican and Democrat alike, use administrative power this way.<sup>36</sup> President George W. Bush used regulation, not legislation, to impose steel tariffs and ban physician-assisted suicide.<sup>37</sup> And after his party lost control of Congress, President Obama brought “Washington veterans... into the West Wing to emphasize an executive style of governing that aims to sidestep Congress more often.”<sup>38</sup> The Obama administration thus used regulatory power, not legislation, to address high-profile policies like immigration (Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans), greenhouse gases (the Clean Power Plan), and the Internet (net neutrality).<sup>39</sup> And for his part, President Trump did the same, but for different policies, including restrictions on immigration and construction of a wall along the U.S.-Mexican border.<sup>40</sup> Not by accident,

many of the Trump administration's most controversial policies are regulatory in character. Because Congress rarely enacts major legislation (often because the public is sharply divided on major policy issues), the executive branch increasingly acts *without* Congress.

Lawmaking by regulation, not legislation, can be problematic. The Constitution creates a multistep lawmaking process, complete with veto points (that is, approval by both houses of Congress and then the president or a veto override by a supermajority of Congress), for the purpose of producing higher-quality, more legitimate laws.<sup>41</sup> Yet agency power sometimes may allow agencies to bypass that process by essentially weaponizing *Chevron* deference. Judge Lawrence Silberman, an expert on administrative law and an early supporter of *Chevron*, now says that agencies increasingly “exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion.”<sup>42</sup> Nor does skepticism of *Chevron* break down along ideological lines.<sup>43</sup> Perhaps even more startling, agencies sometimes can announce a new interpretation, claim deference for that interpretation, and then apply it to things that have already happened.<sup>44</sup> Although there are limits on this power, changing the law after the fact sounds uncomfortably close to something out of Squealer the Pig's playbook.<sup>45</sup>

To be sure, Congress sometimes deliberately empowers agencies with broad authority. Yet such express delegation may create a perverse version of the *dead hand problem*, the notion that laws enacted long ago lose their claim to democratic legitimacy, with the counterargument being that stability is sufficiently valuable that the living choose to accept what the dead have done.<sup>46</sup> In administrative law, however, things are different: agencies rely on old delegations not to retain the status quo but rather to create new rules that today's Congress would not enact. Yet today's Congress also cannot withdraw the power that yesterday's Congress delegated away, since the very process set out in the Constitution to prevent policy from being created without widespread support stands in the way.

All of this leads to another problem: zigzagging regulation. It is not by accident that many of the nation's most significant policies have short shelf lives. Consider broadband regulation. During the George W. Bush administration, the Federal Communications Commission opted for a “light touch” scheme to encourage investment in broadband infrastructure. Yet when the Obama administration came into power, the FCC reversed course and used that same authority to impose heavier rules on broadband providers as part of its net neutrality regulations. Soon after President Trump took the oath of office, the FCC, with new political leadership, reverted back to the light-touch approach used by the Bush administration. Now that the White House has flipped hands again, there is already talk that the heavier version will make a comeback.<sup>47</sup> Similar stories can be told in the context of environmental law, labor law, and immigration law, among others. These zigzags are not costless. Regulatory uncertainty imposes significant burdens on innova-



tion and makes it harder for agencies to pursue long-term goals.<sup>48</sup> It is difficult to encourage the private sector to invest in, say, new forms of energy when policy changes every four to eight years.

These problems call out for a deconstruction. The theory undergirding the administrative state is imperfect. Properly understood, administrative law is a battle between two ideas: “agencies need discretion but discretion can be abused.”<sup>49</sup> The framework we have inherited from the 1940s, marked by few constitutional constraints and a hodgepodge of statutory limits, is often a poor fit for today’s world. The Supreme Court in the 1930s and 1940s minimized safeguards in order to give agencies more breathing room. Since then, the Court has also limited the APA’s safeguards. To be sure, the Court, perhaps driven by constitutional concerns, has also sometimes stretched the APA the other way, imposing requirements that may not be found in the text.<sup>50</sup> But the overall result is a system increasingly out of balance. The theory upon which the administrative state is built is that expert agencies pursue the public interest and do not need that many safeguards. Modern government stumbles when that theory breaks down.

Deconstruction, however, does not have to mean destruction. It is possible to reform the administrative state without tossing it out. And that is what is going to happen. The Court may refuse to extend some cases, overrule others, and tweak around the edges, but it is not going to burn everything to the ground. And for many issues, readjusting the balance does not require massive change. This is especially true because Congress and the White House may themselves reform administrative law, thus mooting judicial intervention.

To begin, it is important to understand how the Supreme Court works. Despite strong rhetoric, today’s Court has not taken huge steps when addressing administrative law issues. There is a reason for this: the Court respects stability. This does not mean that the Court will uphold every old case. Indeed, the law of *stare decisis* – the principle that courts will follow prior decisions – itself allows some overruling and does not require that precedent be “expanded to the limit of its logic.”<sup>51</sup> But this respect for stability does mean that the Court is not going to tear the system down.

The Supreme Court’s decisions provide examples of how this works. Consider *Kisor v. Wilkie*, decided in 2019, which concerns the deference due an agency’s interpretation of its own regulations.<sup>52</sup> Since the 1940s, the Court has recognized that agency interpretations of ambiguous regulations are entitled to some deference. This deference, however, is controversial; it may reward agencies for being imprecise. The Court in *Kisor* decided not to formally overrule anything, yet also refused to simply retain the status quo. Instead, in a decision written by Justice Kagan and joined in relevant part by Chief Justice John Roberts, the Court imposed significant new limitations designed to prevent agency abuse. In response to this move, Justice Neil Gorsuch explained that he would have overruled this species of



deference altogether, but the standard he offered to replace it was similar to Kagan's.<sup>53</sup> The Court thus both upheld and reformed precedent. This is not an isolated episode. The Court has not overruled agency independence altogether, but the Court has imposed limits on it.<sup>54</sup>

The observation that the Court isn't looking to tear everything down applies to nondelegation, too. There has been much consternation in some circles that the Court may again enforce the *nondelegation doctrine*: the rule that Congress cannot delegate too much power. But limiting delegation does not mean that the Court is "ready to take a wrecking ball to the entire federal bureaucracy."<sup>55</sup> Indeed, Justice Brett Kavanaugh has explained what is on the table: namely, a rule that only Congress can decide "major policy question[s] of great economic and political importance," which he has elsewhere identified as including net neutrality and the like.<sup>56</sup> Policies within that narrow category are certainly important, but they also are less than 1 percent of what agencies do. We can (and should!) debate a major-questions standard (which may be difficult to apply because it can be difficult to tell what is major and what is not), but we should not overstate it. The same is true for other changes. Obviously, there is room for serious debate about what the law requires, and the justices may be wrong. But the Court's driving principle is to bring the administrative state more in line with the Constitution in order to produce higher-quality policy through a better, more legitimate lawmaking process.

Moreover, the Supreme Court is not the only player. Congress and the White House are also involved. There are a number of potential statutory reforms available.<sup>57</sup> Obviously, gridlock is real, so perhaps hoping for bipartisan legislation anytime soon is Pollyannaish. But there is room for reform that cuts across party lines. Similarly, the White House is free to impose its own safeguards on regulatory power to ensure greater transparency and fairness. To be sure, none of these solutions are perfect and the specifics of reform should be debated. The larger point, though, is that common-sense changes will not topple the government but can mitigate festering problems.

**D**econstruction can be a scary word – especially when used to mean destruction. But we do not have to use the word that way, and we should not. Instead, we should try to understand the theory behind today's administrative state. Doing so, we see that expertise is important, but safeguards are too, else "expertise, the strength of modern government, . . . become[s] a monster which rules with no practical limits on its discretion."<sup>58</sup> Because today's safeguards increasingly cannot bear the load placed on them, we should not be surprised that talk of reform is in the air. No doubt there will be strong disagreement about what reform should look like. But the goal should not be destruction. Instead, it should be improvement.

## ABOUT THE AUTHOR

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## ENDNOTES

- <sup>1</sup> See, for example, Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (1) (2017), quoting Philip Rucker and Robert Costa, "Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'" *The Washington Post*, February 23, 2017.
- <sup>2</sup> See, for example, Jeffrey A. Pojanowski, "Neoclassical Administrative Law," *Harvard Law Review* 133 (3) (2020): 853, 888, noting their skepticism of agency-empowering doctrines.
- <sup>3</sup> See, for example, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), weakening deference to an agency's interpretation of its own regulations; *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), rejecting deference where the Department of Justice and National Labor Relations Board disagree on interpretation; *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018); and *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).
- <sup>4</sup> See, for example, Aaron L. Nielson, "Confessions of an 'Anti-Administrativist,'" *Harvard Law Review Forum* 131 (1) (2017): 6.
- <sup>5</sup> "Deconstruction," Merriam-Webster.com, defining "deconstruction" as "the analytic examination of something (such as a theory) often in order to reveal its inadequacy" and noting that some people incorrectly define it as synonymous with "demolition." See also J. M. Balkin, "Being Just with Deconstruction," *Social & Legal Studies* 3 (3) (1994): 393, explaining that "a very ordinary sense" of deconstruction "involves pointing out that something is wrong and arguing that it could and should be made better."
- <sup>6</sup> See, for example, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203–2204 (2020). "Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."
- <sup>7</sup> For a more complete version of this history, see Aaron L. Nielson, "Visualizing Change in Administrative Law," *Georgia Law Review* 49 (3) (2015): 757.
- <sup>8</sup> Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* 123 (6) (1975): 1267, 1271.
- <sup>9</sup> *ICC v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 93 (1913).
- <sup>10</sup> Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, "The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy," *Wake Forest Law Review* 47 (2012): 463, 471.
- <sup>11</sup> Woodrow Wilson, "Democracy and Efficiency," *Atlantic Monthly* 87 (1901): 289, 299. "We lack in our domestic arrangements, above all things else, concentration, both in political leadership and in administrative organization."

- <sup>12</sup> Shapiro et al., “The Enlightenment of Administrative Law,” 469.
- <sup>13</sup> Felix Frankfurter, “The Task of Administrative Law,” *University of Pennsylvania Law Review* 75 (7) (1927): 614, 618.
- <sup>14</sup> Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245, 2261, discussing James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938).
- <sup>15</sup> *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001). In 1935, the Supreme Court held, unanimously, that Congress cannot delegate that much authority. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The story, perhaps apocryphal, is that after *Schechter Poultry* was decided, Justice Louis Brandeis privately told the White House that the Court would not “let this government centralize everything.” David P. Currie, “The Constitution in the Supreme Court: The New Deal, 1931–1940,” *University of Chicago Law Review* 54 (2) (1987): 504, 544, n. 181.
- <sup>16</sup> Walter F. Dodd, “Administrative Agencies as Legislators and Judges,” *American Bar Association Journal* 25 (11) (1939): 923, 925, quoted in Shapiro et al., “The Enlightenment of Administrative Law.”
- <sup>17</sup> See Nielson, “Visualizing Change in Administrative Law,” 769–771, discussing this history.
- <sup>18</sup> George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,” *Northwestern University Law Review* 90 (4) (1996): 1557, 1562.
- <sup>19</sup> *Ibid.*, 1558.
- <sup>20</sup> See, for example, *ibid.*, 1649–1652, 1654–1657.
- <sup>21</sup> See Nielson, “Visualizing Change in Administrative Law,” 774–788, discussing this history.
- <sup>22</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).
- <sup>23</sup> Cass R. Sunstein, “Beyond *Marbury*: The Executive’s Power to Say What the Law Is,” *The Yale Law Journal* 115 (9) (2006): 2580, 2589.
- <sup>24</sup> See, for example, Daniel J. Hemel and Aaron L. Nielson, “*Chevron* Step One-and-a-Half,” *The University of Chicago Law Review* 84 (2017): 757, 772.
- <sup>25</sup> *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).
- <sup>26</sup> See, for example, Neal Devins and David E. Lewis, “Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design,” *Boston University Law Review* 88 (2008): 459, 491. “Common sense and existing scholarship point to the increasing identity of interests between the President and independent-agency commissioners from the president’s party.” See also Kagan, “Presidential Administration,” 2277–2281, 2284–2289, 2290–2299, 2308–2309.
- <sup>27</sup> Richard H. Pildes and Cass R. Sunstein, “Reinventing the Regulatory State,” *The University of Chicago Law Review* 62 (1) (1995): 4.
- <sup>28</sup> See, for example, Friedrich A. Hayek, “The Use of Knowledge in Society,” *The American Economic Review* 35 (4) (1945): 519–530.
- <sup>29</sup> See, for example, Wentong Zheng, “The Revolving Door,” *Notre Dame Law Review* 90 (3) (2015): 1265, explaining “the incentive for regulators to expand the market demand for services they would be providing when they exit the government.”

- <sup>30</sup> See, for example, Wendy E. Wagner, “The Science Charade in Toxic Risk Regulation,” *Columbia Law Review* 95 (7) (1995): 1613, 1640–1650, offering examples of confusing jargon.
- <sup>31</sup> See, for example, Jonathan R. Macey, “Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty,” *Cardozo Law Review* 15 (1994): 909.
- <sup>32</sup> Kagan, “Presidential Administration,” 2261.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> James V. DeLong, “New Wine for a New Bottle: Judicial Review in the Regulatory State,” *Virginia Law Review* 72 (2) (1986): 399, 429. “The steady growth of the Regulatory State has greatly increased the number of grants of authority that agencies may exploit.”
- <sup>35</sup> Kagan, “Presidential Administration,” 2248.
- <sup>36</sup> See, for example, Jerry L. Mashaw and David Berke, “Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience,” *Yale Journal on Regulation* 35 (2) (2018): 549, 606, offering examples.
- <sup>37</sup> See, for example, Kevin K. Ho, “Trading Rights and Wrongs: The 2002 Bush Steel Tariffs,” *Berkeley Journal of International Law* 21 (3) (2003): 825, 826–834; and *Gonzalez v. Oregon*, 546 U.S. 243, 251–254 (2006).
- <sup>38</sup> Scott Wilson, “Obama’s Rough 2013 Prompts a New Blueprint,” *The Washington Post*, January 25, 2014.
- <sup>39</sup> See, for example, Mashaw and Berke, “Presidential Administration in a Regime of Separated Powers,” 563–568, 579–582, discussing DACA/DAPA and net neutrality.
- <sup>40</sup> See, for example, *ibid.*, 569–573, discussing immigration restrictions; and Executive Order No. 13767, *Federal Register* 82 (8793) (2017), ordering construction of a border wall.
- <sup>41</sup> See, for example, John Manning, “Lawmaking Made Easy,” *Green Bag* (2d) (2007): 191, 200, explaining that “a multicameral system . . . makes it harder even for a majority to enact self-interested or oppressive legislation.”
- <sup>42</sup> *Global Tel\*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman concurring); and Laurence H. Silberman, “Chevron – The Intersection of Law & Policy,” *The George Washington Law Review* 58 (5) (1990): 821, defending *Chevron*.
- <sup>43</sup> See, for example, Abbe R. Gluck and Richard A. Posner, “Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals,” *Harvard Law Review* 131 (5) (2018): 1298, 1302, offering data demonstrating that a majority of surveyed federal circuit judges “are not fans of *Chevron*”; and *ibid.*, 1348; “The judges expressing skepticism regarding *Chevron* divide equally among liberals and conservatives.”
- <sup>44</sup> While he was still a circuit judge, Neil Gorsuch concluded that immigration officials cannot apply an agency interpretation retroactively to the detriment of someone who did what a court had previously said was lawful. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). This decision is one that his critics often cite to show that Gorsuch is a skeptic of the administrative state.
- <sup>45</sup> See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008), describing the prospect of “unknowable law” as “literally Orwellian,” citing George Orwell, *Animal Farm* (Boston: Harcourt, 1946), 102–103. See also *ibid.*, quoting Antonin Scalia, “The Rule of Law as a Law of Rules,” *University of Chicago Law Review* 56 (4) (1989): 1175, 1179; “One of emperor

Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress."

- <sup>46</sup> See, for example, Frank H. Easterbrook, "Textualism and the Dead Hand," *George Washington Law Review* 66 (1998): 1119; Aaron L. Nielson, "Dead Hands," *Yale Journal on Regulation*, July 26, 2019, <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-dead-hands/>; and Jonathan H. Adler and Christopher J. Walker, "Delegation and Time," *Iowa Law Review* 105 (5) (2020).
- <sup>47</sup> See Aaron L. Nielson, "Sticky Regulations and Net Neutrality Internet Freedom," *Hastings Law Journal* 71 (2020); and Tony Romm, "Pressure Builds on Biden, Democrats to Revive Net Neutrality Rules," *The Washington Post*, January 27, 2021.
- <sup>48</sup> See, for example, Jonathan Masur, "Judicial Deference and the Credibility of Agency Commitments," *Vanderbilt Law Review* 60 (4) (2007): 1021, 1037–1060.
- <sup>49</sup> Nielson, "Visualizing Change in Administrative Law," 762.
- <sup>50</sup> See, for example, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy concurring).
- <sup>51</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007). As I have explained elsewhere, "the Court does not want to tear everything down. But when confronted with new problems—or the emergence of more virulent strains of old problems—the Court also recognizes that it is not bound by stare decisis and so uses traditional legal tools to try to get the law right." Nielson, "Confessions of an 'Anti-Administrativist,'" 10.
- <sup>52</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
- <sup>53</sup> See, for example, *ibid.*, 2424 (Roberts concurring in part).
- <sup>54</sup> See, for example, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). For what it is worth, giving the president greater control over agencies does not address the problem of presidents aggressively using regulatory power, which requires reform to deference and the like. But, at least in theory, it may help limit other pathologies, such as agency officials pursuing self-interests.
- <sup>55</sup> Mark Joseph Stern, "The Supreme Court's Conservatives Are Ready to Take a Wrecking Ball to the Entire Federal Bureaucracy," *Slate*, June 20, 2019, <https://slate.com/news-and-politics/2019/06/neil-gorsuch-supreme-court-conservatives-gundy-sex-offender.html>.
- <sup>56</sup> See *Paul v. United States*, 140 S. Ct. 342, 342 (Kavanaugh concurring); and *U.S. Telecom Association v. FCC*, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh dissenting).
- <sup>57</sup> See, for example, Christopher J. Walker, "Modernizing the Administrative Procedure Act," *Administrative Law Review* 69 (3) (2017): 629, discussing possible reforms.
- <sup>58</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962).

# Constraining Bureaucracy Beyond Judicial Review

*Christopher J. Walker*

*The modern regulatory state – and the field of administrative law that studies it – is in need of “deconstruction.” That does not mean that it should be dismantled entirely. This essay does not embrace the reformers’ fixation on courts as the bulwark against agency overreach. Rather, this essay develops the concept of bureaucracy beyond judicial review: not only agency actions that statute or judicial doctrine precludes from judicial review, but also agency actions that are technically subject to judicial review yet effectively insulated from it. Appreciating the phenomenon of bureaucracy beyond judicial review should encourage us to rethink theories and doctrines in administrative law. If judicial review provides no safeguard against potential abuses of power in most regulatory activities, we must turn to other mechanisms. All three branches of the federal government must play their roles, as should civil society and the agencies themselves.*

**T**he vast majority of federal lawmaking today takes place not in the halls of Congress, but in the bureaucratic trenches: by hundreds of thousands of political and career bureaucrats in Washington, D.C., and throughout the nation. As regulation rises and legislation declines, administrative law, too, grows in importance. Administrative law, after all, sets the ground rules for regulation. It dictates how federal agencies regulate and how the other federal government actors – the president, Congress, and the courts – supervise, review, influence, motivate, and constrain agency action. It also opens up space for public participation in the regulatory process, while attempting to close out undue outside influence and lobbying. When there is a change in presidential administration, administrative law enables law and policy change without legislative action. Indeed, with a Congress that has arguably lost much of its lawmaking ambition, change we can believe in must inevitably come from the administrative state. This ascendant vision of bureaucratic governance goes well beyond the “presidential administration” Elena Kagan articulated two decades ago.<sup>1</sup>

With this rise and rise – and further rise! – of the administrative state in federal lawmaking, it is no surprise that administrative law itself has become an ideological battleground.<sup>2</sup> During the Obama administration, we began to see an up-



swing in scholars (largely conservative and libertarian) questioning the modern administrative state's legitimacy in our constitutional order.<sup>3</sup> In response, Gillian Metzger dedicated her foreword to the *Harvard Law Review* volume on the 2016 Supreme Court term to declare that the administrative state is "under siege" and to divide the legal academy into two camps: those who favor a robust administrative state and the "anti-administrativists."<sup>4</sup>

More recently, legal scholar Jeffrey Pojanowski attempted to bring granularity to this us-versus-them dichotomy by disaggregating the field into three main camps.<sup>5</sup> The "administrative supremacy" camp views the administrative state as constitutionally necessary for modern governance. Courts should not patrol agencies' substantive actions or their choice of procedures, only review to encourage effective governance. "Administrative skepticism," by contrast, is formalist in nature and finds much of the modern administrative state unconstitutional. Courts should review *de novo* administrative interpretations of law, utilize the non-delegation doctrine to strike down broad statutory delegations, and otherwise embrace judicial doctrines that constrain bureaucratic action.

"Administrative pragmatism," which Pojanowski situates in between these two extremes, "seeks to reconcile the reality of administrative power, expertise, and political authority with broader constitutional and rule-of-law values." In many respects, administrative pragmatism is the conventional view, reflected in current administrative law doctrine and regulatory practice. Pojanowski argues for a neoclassical alternative to administrative skepticism, in which courts would not defer to administrative interpretations of law but would defer to agency policy decisions. It would disarm the constitutional calls to deconstruct the modern regulatory state. Instead, it would encourage courts to faithfully interpret the Administrative Procedure Act and the agencies' organic statutes to ensure agencies do not exceed their statutory authority.

However administrative law scholars are categorized, it is beyond serious dispute that the academic criticisms of the modern administrative state have risen over the last decade, and the academic rebuttals and defenses have followed.<sup>6</sup> These academic criticisms have made their way from the ivory tower into the real world (and vice versa, perhaps). A growing number of federal judges and members of Congress (again, largely conservative and libertarian) have called for administrative law reform. For example, they have argued for eliminating judicial deference to administrative interpretations of law and for reinvigorating the non-delegation doctrine to strike down as unconstitutional broad statutory grants of lawmaking authority to federal agencies.<sup>7</sup>

Donald Trump's election as president, moreover, ushered in a deregulatory agenda, one that perhaps went beyond a typical Republican presidential administration. Shortly after the 2016 election, President Trump's chief strategist Stephen Bannon grabbed headlines by demanding a "deconstruction of the administrative

state.”<sup>8</sup> The Trump administration took many measures to curtail administrative governance, even in ways that inhibit the president’s power to make law and policy through the executive branch. Reforms to agency guidance, adjudication and enforcement policies, rulemaking processes, and the civil service come immediately to mind. Yet the Trump administration also leveraged the regulatory state to wield administrative power in unprecedented ways. One need look no further than its various sweeping immigration regulatory actions as well as its attempts to respond to the COVID-19 pandemic independent of Congress.

One would think that the Trump administration’s regulatory actions would cause even “administrative supremacists” to become concerned about bureaucratic sprawl and overreach – perhaps even more so as the field of administrative law took a critical race theory turn during the summer of 2020.<sup>9</sup> Administrative skeptics certainly have not changed their tune about the need to rein in the regulatory state. The vast majority of administrative law scholars, however, are not what Pojanowski labels administrative supremacists. Nor, of course, are they administrative skeptics. Instead, they are administrative pragmatists who view the modern administrative state as imperfect yet necessary. These pragmatists recognize the importance of both enabling administrative discretion and constraining that exercise of discretion to avoid arbitrary and capricious agency action. In shaping administrative law, they promote values such as agency expertise, reasoned decision-making, due process, fairness, consistency, transparency, and public accountability in administrative governance.

In other words, the vast majority of administrative law scholars have always been concerned with constraining bureaucratic power. And many of us – particularly administrative skeptics but also many administrative pragmatists – are growing increasingly concerned about the shift from legislation to regulation to make major policy decisions at the federal level and what that means for the future of administrative law. Yet our focus has been myopically court-centric. Administrative law, as a field, has long fixated on the role of federal courts in reviewing and constraining agency action. Each year hundreds of law review articles are published on administrative law’s judicial deference doctrines and other standards of judicial review. Indeed, since its birth in 1984, the Supreme Court’s landmark judicial deference decision in *Chevron v. Natural Resources Defense Council* has been cited on Westlaw more than ninety thousand times, including in more than twenty thousand law review articles and other secondary materials. In the last year alone, the *Chevron* decision has appeared in more than fifteen hundred secondary materials. As legal scholars Kevin Stack and Peter Strauss have argued, the history of our approach to teach administrative law has no doubt also contributed to the field’s emphasis on courts.<sup>10</sup>

This judicial focal point should come as no surprise. Federal courts serve as a critical safeguard in the modern administrative state. But it is a mistake to focus

just on courts. Much of administrative law happens without courts. Put differently, federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review. I am not the first to make this observation in the field of administrative law. Among others, Jerry Mashaw has been examining this phenomenon for decades, including in his seminal book *Bureaucratic Justice*.<sup>11</sup> No doubt sparked by Mashaw's work, internal administrative law has become a trending subfield in administrative law.<sup>12</sup>

To be sure, scholars of public administration have spent decades developing theories about internal bureaucratic organization and control.<sup>13</sup> In the field of administrative law, however, a more comprehensive and sustained inquiry is needed, especially for those of us intent on “deconstructing” the modern administrative state by strengthening safeguards against bureaucratic overreach. This essay focuses on the state of the administrative law field, but more interaction with these other fields is sorely needed. To help move this work forward, this essay sketches out a research agenda for a more systemic investigation into this phenomenon, which I will call *bureaucracy beyond judicial review*. I have two main goals.

*First*, in the field of administrative law, the concept of bureaucracy beyond judicial review is undertheorized. The conventional account focuses on one underinclusive category of agency action: where judicial review is expressly precluded by statute or judicial doctrine. If our goal is to constrain bureaucracy beyond judicial review, at least three additional categories deserve attention. On the one hand, judicial review is technically available for many agency actions, yet for a variety of reasons they never make it to federal court. On the other, even agency actions that make it to court are often subject to deferential standards of review that create an administrative policy-making space insulated from judicial review.

This agency policy-making space is further complicated by the fact that federal agencies play a substantial, judicially unreviewable role in drafting the statutes (and presidential budgets and executive orders) that govern them. In other words, federal agencies have the potential to essentially self-delegate the bureaucratic power that is insulated from judicial review. In theorizing bureaucracy beyond judicial review in the first part of this essay, I draw on recent examples from both the Obama and Trump administrations.

*Second*, understanding bureaucracy beyond judicial review should encourage us to rethink existing theories and doctrines in administrative law. So much scholarly attention has focused on refining judicial deference doctrines and standards of review to strike the right balance of allowing agencies to reasonably exercise their expertise yet rein in arbitrary exercises of agency discretion. But because judicial review provides no adequate safeguard against potential abuses with respect to these regulatory activities, we must turn to other actors and actions. We must develop a theory of administrative law that better incorporates the various

other actors who can help monitor, constrain, and protect against agency abuse in regulatory activities insulated from judicial review.

That does not mean we give up on judicial review. When reframed in light of bureaucracy beyond judicial review, administrative law's theory of judicial review would focus not just on the individual cases that make it to court but also on how courts can have a more systemic effect on those agency actions that never reach them. The second part of this essay explores how courts, Congress, and the agencies themselves can help counteract the dangers of bureaucracy beyond judicial review.

**T**he conventional account of bureaucracy beyond judicial review focuses on agency actions that statute or judicial doctrine expressly excludes from the courts' purview. The founders of the Administrative Procedure Act (APA) of 1946 envisioned that some agency actions would be precluded from judicial review. Indeed, in Section 701(a) of the APA, Congress makes clear that the APA does not apply when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." These two categories arguably make up the standard view of bureaucracy beyond judicial review. Each category merits some further elaboration.

It is not uncommon for Congress to statutorily exclude judicial review for certain agency actions. Immigration law is a prime example. In *Department of Homeland Security v. Thuraissigiam* (2020), the Supreme Court confronted the constitutionality of the lack of judicial review for one such agency action: expedited removal of noncitizens at or near the border.<sup>14</sup> Expedited removal is one form of what immigration scholars have coined "shadow removals" or "speedy deportations": where Congress has generally precluded not only Article III (of the U.S. Constitution) judicial review but even administrative review in an Article II immigration court.<sup>15</sup> The *Thuraissigiam* Court rejected constitutional challenges to expedited removal under both the Due Process Clause and the Suspension Clause. In dissent, Justice Sonia Sotomayor declared that the "decision handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers."

The breadth of shadow removals is staggering. In 2018, immigration judges, who are agency adjudicators within the Justice Department's Executive Office for Immigration Review, received roughly three hundred thousand cases and concluded more than two hundred thousand cases.<sup>16</sup> Those cases receive administrative review in the immigration courts. If the noncitizens are ordered removed at the conclusion of the administrative proceedings, they generally can seek further review in an Article III federal court. But, as immigration law scholar Jennifer Koh has documented, the vast majority of removal orders today never make it to immigration court. They are issued through shadow removals "by front-line immi-

gration officers acting as investigator, prosecutor, and judge, thus bypassing the immigration courts entirely.”<sup>17</sup> Indeed, in 2018, more than four out of five removals were shadow removals, conducted without a formal administrative hearing or Article III judicial review.

Many agency actions are not judicially reviewable because they are “committed to agency discretion by law.” Agency enforcement discretion is the quintessential example. As the Supreme Court held in *Heckler v. Chaney* (1985), agencies enjoy a form of prosecutorial discretion for enforcement decisions: a “presumption that agency decisions not to institute enforcement proceedings are unreviewable.”<sup>18</sup> In *Department of Homeland Security v. Regents of the University of California* (2020), the Court confronted this category of discretionary agency action in the context of the Trump administration’s decision to rescind the Obama administration’s Deferred Action for Childhood Arrivals program (DACA). There, again, the Court reaffirmed that agency enforcement decisions are generally unreviewable as committed to agency discretion. Yet the Court disagreed that DACA is just a nonenforcement policy, as DACA also grants certain benefits.<sup>19</sup>

This nonreviewable agency discretion extends not just to under-enforcement but also to over-enforcement. Or, as legal scholar Mila Sohoni calls it, “crackdowns.” A crackdown is “an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses.”<sup>20</sup> Consider the Trump administration’s immigration enforcement crackdown in San Francisco and surrounding cities. In 2018, reports swirled that Immigration and Customs Enforcement (ICE) sought to arrest more than 1,500 noncitizens and that the crackdown was motivated in part by California’s decision to become a sanctuary state and thus not fully cooperate with the federal government to enforce federal immigration law. Indeed, ICE’s acting director publicly declared: “California better hold on tight”; if state and local officials “don’t want to protect their communities, then ICE will.”<sup>21</sup>

Deciding when and where to dedicate enforcement resources is a powerful regulatory tool. Agency decisions to refrain from enforcement benefit the potential enforcers. And they harm the beneficiaries of the potential enforcement action: the consumers, competitors, investors, employees, and so forth, whose rights and interests go unprotected by the regulators’ decision not to enforce the laws. Conversely, when agencies decide to crack down, the subjects of the crackdown suffer, whereas similarly situated regulated parties do not, for reasons beyond the control of the regulated. That, too, can create arbitrary advantages and disadvantages for similarly situated regulated parties, in addition to the accompanying externalities for third parties. Yet courts generally cannot patrol agency decisions on when and how to wield their enforcement authority.

The concept of bureaucracy beyond judicial review should also include agency actions for which judicial review is technically available, yet for a variety

of reasons never make it to federal court. High-volume agency adjudication is a classic example. As I have explored elsewhere, the Article III federal judiciary receives outsized attention compared with the attention paid to the federal administrative judiciary.<sup>22</sup> After all, more than twelve thousand agency adjudicators hold hearings and decide cases, compared with fewer than nine hundred Article III judges. Much has been made of the Trump administration's appointment of some two hundred Article III judges. Yet its hiring of nearly two hundred and fifty Article II immigration judges has hardly been noticed (outside of immigration law circles).

In the realm of formal agency adjudication, one perhaps would not anticipate discovering bureaucracy beyond judicial review. After all, formal adjudication involves trial-like agency proceedings before an administrative law judge or some other agency adjudicator, where the parties have the statutory right to seek judicial review of the agency's final decision. But even formal agency adjudication can be insulated from judicial review. This is particularly true for mass agency adjudication – such as immigration, Social Security, and veterans' adjudications – in which only a fraction of cases ever reach federal courts.

Let us return to immigration adjudication. As noted above, immigration courts decide several hundred thousand cases per year. According to one 2015 study, roughly two in five immigrants in removal proceedings in immigration court had legal representation, and less than half of those represented had representation for all of their agency hearings.<sup>23</sup> Unsurprisingly, immigrants represented by counsel are more likely to prevail: that same study found that represented immigrants won tenfold (21 percent) more often than unrepresented immigrants (2 percent). That is in part because unrepresented immigrants were fifteen times less likely to even seek relief from removal. The lack of legal representation no doubt plays a significant role in creating the stark disparities in the immigration adjudication system, and in preventing many potentially successful claims from reaching an Article III court. There's a reason why a seminal empirical study on immigration adjudication labels the system "refugee roulette."<sup>24</sup>

So what does this mean for the phenomenon of bureaucracy beyond judicial review? Because noncitizens often navigate agency adjudication without legal representation, it is much more likely that individuals will not seek judicial review of erroneous agency decisions. Either they lack the knowledge or resources to navigate the process, or they have otherwise procedurally defaulted meritorious claims in the administrative process. Thus, courts never have the opportunity to directly help these individuals. Courts' ability to correct agency errors is limited to the subset of cases in which individuals have the wherewithal to seek judicial review.

Subregulatory guidance is another context in which agency action is substantially insulated from judicial review. The conventional understanding is that agen-



cy guidance does not have the force of law, and thus is not judicially reviewable absent the agency's application of that guidance in enforcement or adjudication. Whether agency guidance is actually nonbinding on regulated parties is subject to considerable debate. For instance, last year, the Justice Department issued an interim final rule that sets forth a number of requirements and procedures for creating agency guidance documents, including that "guidance documents may not be used as a substitute for regulation and may not be used to impose new standards of conduct on persons outside the Executive Branch."<sup>25</sup>

Regardless of whether agency guidance can be *formally* binding yet escape judicial review, it often *functionally* binds regulated parties in ways insulated from judicial review. As legal scholar Nicholas Parrillo has documented, even when agency guidance is not legally binding, regulated parties often have strong incentives to comply due to significant risks of agency enforcement, certain agency preapproval requirements, the need to maintain a good relationship with the agency, or "intra-firm constituencies for compliance beyond legal requirements."<sup>26</sup>

Indeed, in the context of the Obama administration's "dear colleague letter" to universities on Title IX sexual harassment claims procedures, some scholars observed that, "terrified, administrators not only complied; they over-complied."<sup>27</sup> To be sure, the universities could have sought judicial review. They could have refused to comply, and then challenged in court the agency's enforcement decision or the federal government's withdrawal of all federal funding. But the stakes (losing all federal funding) were obviously too high. And it certainly does not encourage regulated parties to seek judicial review when, under the *Auer* deference doctrine, the court must defer to the agency's regulatory interpretation advanced in agency guidance "unless plainly erroneous or inconsistent with the regulation."<sup>28</sup> I have previously called this effect *regulation by compliance*.<sup>29</sup>

In discussing the potential dangers of agency guidance, I do not mean to suggest we should abandon it. Agency guidance serves important purposes. Its role in the modern regulatory state is critical. My point is that it is greatly insulated from judicial review. And as Parrillo observes, administrative law scholarship on guidance "misses much about the everyday workings of guidance that pervade the administrative state, for it focuses on the tiny fraction of guidance documents that get challenged in litigation, and only on the kinds of facts about guidance that reach the courts."<sup>30</sup>

Bureaucracy beyond judicial review should also encompass the administrative policy-making space that administrative law's judicial deference doctrines create. *Chevron* deference is perhaps the prime example. As the Supreme Court explained in the *Chevron* decision itself, the reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if

the question initially had arisen in a judicial proceeding.”<sup>31</sup> Agencies thus enjoy *Chevron* policy-making “space” to regulate in ways subject to judicial review only for their reasonableness.<sup>32</sup>

This *Chevron* policy-making space is real and substantial. In reviewing every published federal court of appeals decision from 2003 through 2013 that refers to *Chevron* deference, administrative law scholar Kent Barnett and I found a difference of nearly twenty-five percentage points in agency-win rates when judges decide to apply the *Chevron* deference framework.<sup>33</sup> And once the circuit courts got to *Chevron*’s second step, agencies prevailed 93.8 percent of the time.

It is also clear that federal agencies are keenly aware of this *Chevron* space. In a survey of 128 federal agency rule drafters, *Chevron* deference was the most-known interpretive tool by name (94 percent) and most reported as playing a role in agency rule drafting (90 percent) among twenty-two interpretive tools included in the survey.<sup>34</sup> Nearly nine out of ten rule drafters agreed or strongly agreed that they think about subsequent judicial review when drafting statutes, and two out of every five rule drafters surveyed agreed or strongly agreed – with another two in five somewhat agreeing – that a federal agency is more “aggressive” in its interpretive efforts if it is confident that *Chevron* deference applies (as opposed to some less-deferential standard).

In other words, agencies know they have policy-making space under *Chevron*; not surprisingly, they act differently when they believe the threat of judicial invalidation is low.

How *Chevron*’s policy-making space enhances bureaucracy beyond judicial review is further complicated by the fact that federal agencies play a substantial role in drafting the laws that delegate them that space in the first place. As I have documented elsewhere, federal agencies are substantially involved in the legislative process. They propose substantive legislation to Congress and provide confidential technical drafting assistance on nearly all legislation drafted by congressional staffers that affect the agency.<sup>35</sup> Legal scholars Eloise Pasachoff and Tara Leigh Grove have similarly documented the substantial role federal agencies play in the drafting of presidential budget and executive orders, respectively.<sup>36</sup>

Courts, of course, review enacted statutes to determine their meaning and constitutionality. But courts do not review how agencies participate in statutory drafting (or in the drafting of presidential directives). They do not assess if agencies self-delegate lawmaking authority by leaving statutory mandates broad and ambiguous, much less the role agencies may play in drafting statutes that eliminate judicial review of agency action altogether. This judicially insulated legislative role is remarkable in and of itself. But it may well also compound the problematic lack of judicial review for the categories of agency action discussed above. After all, all of these agency actions are at least in part creatures of statutes – statutes the agencies themselves helped create.

In light of the vast, underexplored terrain of bureaucracy beyond judicial review, how should administrative law theory and doctrine adjust? As I noted at the outset, administrative law as a field must exit the courtrooms and enter into the expansive world of external and internal laws, doctrines, and practices that assist the various actors who monitor, constrain, and protect against agency abuse in regulatory activities that are insulated from the courts. Here, I focus on the three branches of the federal government. But states and civil society obviously also play important constraining roles.

*The Judicial Branch.* Federal courts must view their role in the modern administrative state as one of more than mere error correction. Much ink has been spilled arguing for shrinking or eliminating the *Chevron* policy-making space. Others have argued to make certain actions more judicially reviewable, such as enforcement decisions, agency guidance documents, and agency actions currently precluded from judicial review by statute. Many of these proposals would likely require congressional action, or at least a judicial philosophy that disregards *stare decisis* (law by precedent) and the Bickelian “passive virtues” I generally embrace.

In light of bureaucracy beyond judicial review, however, courts could more fully embrace one substantial shift in mindset: courts should view their role in the administrative state not only as reviewing the agency actions that reach them but also as engaging in a dialogue with the political branches. This vision reorientation may be particularly important in the context of high-volume agency adjudication, where many individuals have meritorious claims but lack the wherewithal to seek judicial review. As I have documented elsewhere, federal courts possess a toolbox of dialogue-enhancing tools that they can employ when remanding flawed agency adjudications back to the agency.<sup>37</sup>

Where courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some courts require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest (or order) that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Some courts, moreover, obtain concessions from the government at argument to narrow the potential grounds for denial of relief on remand. And courts through their published opinions can set off fire alarms for Congress, the president, and the public to draw attention to potential systemic issues in a regulatory process.

These tools help courts play a more active role in improving equity, efficiency, and consistency in the agency adjudication system generally, rather than just the limited number of cases that make it to a federal court. Yet the tools still respect the proper separation of powers by using mere words instead of orders that may exceed their statutory (or, in some cases, perhaps constitutional) authority. Using

this toolbox is one example of how judicial review in administrative law should be enhanced to address the present-day realities of mass agency adjudication and other bureaucratic actions that otherwise evade judicial review.

*The Executive Branch.* The executive branch itself can play a powerful role in constraining bureaucracy beyond judicial review. Here, I focus on the role of the agencies themselves, and leave for another day the role of the president and centralized regulatory review. The APA and the agencies' organic statutes set the minimum procedural requirements for agency action. The Supreme Court has repeatedly reaffirmed that federal "agencies are free to grant additional procedural rights in the exercise of their discretion."<sup>38</sup> Agencies do so through the creation of internal administrative law, which encompasses a wide range of internal agency procedures, structures, practices, and guidance that seek to constrain their exercises of discretion. This *Vermont Yankee* "white space," as legal scholars Emily Bremer and Sharon Jacobs have called it, has the potential to serve as a potent defense against agency overreach, especially in the context of bureaucracy beyond judicial review.<sup>39</sup> The universe of internal law that could constrain bureaucracy is vast, and I have surveyed it elsewhere.<sup>40</sup> But a few examples for each type of bureaucracy beyond judicial review can illustrate the constraining power of internal administrative law.

For agency actions where judicial review is precluded by statute or judicial doctrine, federal agencies can embrace a variety of internal procedures to protect individuals in those processes. On the shadow removals front, for example, the agency could establish internal review procedures and additional procedural protections. It could create what civil rights law scholar Margo Schlanger has termed an "office of goodness": an internal ombuds office that looks out for the rights of noncitizens in the informal adjudicative process and ensures the agency complies with its external and internal laws.<sup>41</sup>

The Internal Revenue Service's (IRS) Taxpayer Advocate Service provides a model that may be worth adapting in other agency contexts.<sup>42</sup> The Taxpayer Advocate Service is an independent office within the IRS with two distinct main objectives. First, it has physical offices in every state, where individual taxpayers can get free help with their tax problems with the IRS. Second, leveraging these tens of thousands of annual individual interactions nationwide, the Service is required to report regularly to Congress to recommend systemic reforms to the federal tax system. Similar internal structures and procedures could be beneficial in the context of agency enforcement discretion.

For agency actions that are technically subject to judicial review but often evade such review, federal agencies have and should continue to adopt internal laws to protect individuals subject to those regulatory processes. On the mass adjudication front, the Administrative Conference of the United States (an independent federal agency that studies administrative procedure) regularly recommends

best practices, including public availability of practice rules, availability of adjudication materials on agency websites, establishment of recusal rules for adjudicators, best practices for assisting self-represented individuals, and a sweeping suite of procedural protections for agency hearings. Agencies have also adopted appellate review systems and other quality assurance programs by internal law.<sup>43</sup> The Social Security Appeals Council is a prominent example: a creature of internal administrative law that now consists of nearly one hundred administrative appeals judges and officers and processes more than one hundred thousand appeals per year.

Finally, when it comes to an agency's policy-making space created by judicial deference doctrines, the Administrative Conference has recommended a number of best practices agencies can adopt to increase public participation and accountability, including targeting and meeting with knowledgeable or affected parties for feedback, improving online access to rulemaking dockets and related materials, utilizing social media to improve public engagement and awareness of rulemaking activities, and drafting rules in plain language for better public comprehension, just to name a few. As the preceding paragraphs illustrate, the Administrative Conference plays an important role in assessing internal agency laws and practices and identifying best practices agencies can embrace internally to help address bureaucracy beyond judicial review.

Federal agencies can also bind themselves internally to seek only judicial deference if they follow certain procedures. As noted above, last year the Justice Department issued an interim final rule requiring the agency to follow certain procedures when creating guidance documents, with heightened procedures for "significant guidance documents." The rule instructs the agency not to seek any *Auer* deference in litigation for a guidance document that does not "substantially comply" with these requirements. Along similar lines, immigration law scholar Shoba Wadhia and I have argued that the Justice Department and the Department of Homeland Security should create internal administrative law that shifts the default for major policy-making in the immigration context from agency adjudication to notice-and-comment rulemaking.<sup>44</sup> Like the Justice Department's new rule for agency guidance, this new immigration internal law should instruct the immigration agencies not to seek *Chevron* deference for agency statutory interpretations promulgated through agency adjudication (while preserving *Chevron* deference for rulemaking). We argue that shifting the default from adjudication to rulemaking for immigration policy-making is more consistent with *Chevron's* theoretical foundations: to leverage agency expertise, to engage in a deliberative process, and to increase political accountability.

*The Legislative Branch.* Congress must play a more prominent role in constraining bureaucracy beyond judicial review. As legal scholar Josh Chafetz has documented, Congress possesses a suite of hard powers (power of the purse, personnel

power, contempt authority) and soft powers (freedom of speech and debate, internal discipline, cameral rules) that it can employ to constrain the administrative state.<sup>45</sup> Congress should utilize this toolbox to address agency actions that evade judicial review. And administrative law scholars should dedicate more attention to exploring how Congress can better wield these powers in this context; they should, in turn, also leverage the ample literature on the subject in other fields.

At the end of the day, though, increased congressional oversight is unlikely to be sufficient to effectively constrain bureaucracy beyond judicial review. The same is true for senatorial pressure during the confirmation process for the administration's nominees to run the agencies. So, too, with using appropriations power to influence administrative policy change. Congress must also reinvigorate its ambition to legislate and revisit the often decades-old statutes that empower federal agencies.

To encourage Congress to return to passing laws on a regular basis, legal scholar Jonathan Adler and I have argued that Congress should embrace the practice of regular reauthorization of statutes that govern federal agencies.<sup>46</sup> This engagement would include regular assessment of agency action and regular recalibration, if the agency's regulatory activities are inconsistent with the current Congress's policy objectives. In some regulatory contexts, it may require Congress to enact reauthorization incentives, such as sunset provisions designed to induce legislative engagement. In other contexts, Congress may decide that the costs of mandatory reauthorization outweigh the benefits. Nevertheless, Congress should more regularly use reauthorization to mitigate the democratic deficits that come with broad delegations of lawmaking authority to federal agencies. It goes without saying that, as with many proposals to reform Congress, ours would require a greater investment in congressional capacity – in terms of staffing and other resources.

A regular reauthorization process could have dramatic effects on constraining bureaucracy beyond judicial review. Congress would, for example, have to choose whether to continue to preclude judicial review by statute in certain circumstances. In the hearings leading up to reauthorization, it would have an opportunity to hear from the agency and those affected by agency enforcement decisions, and it could apply pressure for the agency to modify its enforcement policies or even legislate to constrain such discretion. For agency actions that are judicially reviewable but often evade review, Congress could similarly assess those systems through reauthorization hearings and could codify best practices for quality assurance, offices of goodness, and the like.

Regarding the agency policy-making space created by judicial deference doctrines, regular reauthorization could play an important role. For many of us, *Chevron* deference has become far more problematic in the current era of congressional inaction. Congress appears to have insufficient capacity or willpower to intervene



when an agency has used statutory ambiguity to pursue a policy inconsistent with current congressional wishes, much less when an agency's organic statute is so outdated as to not equip the agency with authority and direction to address new technologies, challenges, and circumstances. A regular reauthorization process would alleviate many of these concerns.

It is also possible that Congress would consider eliminating or narrowing judicial deference with respect to certain subject matters or administrative processes. Legal scholar Kent Barnett has explored how Congress did so in the Dodd-Frank Act with respect to the Office of the Comptroller of the Currency's statutory interpretations that preempt state law.<sup>47</sup> Similarly, as noted above, Wadhia and I have argued that Congress should eliminate *Chevron* deference in the immigration adjudication context, while preserving it for notice-and-comment rulemaking.

Appreciating the phenomenon of bureaucracy beyond judicial review should encourage us to rethink theories and doctrines in administrative law, and to reconsider the direction of the field of administrative law. So much scholarly attention has focused on refining judicial deference doctrines and standards of review to strike the right balance of allowing agencies to employ their expertise to reasonably exercise their statutorily vested discretion while reining in arbitrary exercises of agency discretion. Administrative skeptics seem to have similarly fixated on courts, calling for the elimination of *Auer* and *Chevron* deference and the reinvigoration of an exacting nondelegation doctrine.

But if judicial review provides no safeguard against potential abuses of power in most regulatory activities, we must turn to other mechanisms. All three branches of the federal government must play their roles. As should civil society and the agencies themselves. (When it comes to the agencies, this also must include the role of a professionalized civil service.) This is the type of "deconstruction of the administrative state" that deserves more scholarly and real-world attention.

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#### AUTHOR'S NOTE

This essay draws from the author's address at the V International Congress on Institutional Theory at the Federal University of Rio de Janeiro, Brazil. It also weaves together a number of distinct lines in the author's research agenda; the endnotes attribute such reliance. The themes presented in this essay are further developed in the author's forthcoming book, *Constraining Bureaucracy: Rethinking Administrative Law in a System without Courts* (Cambridge University Press).

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## ENDNOTES

- <sup>1</sup> Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (8) (2001): 2245.
- <sup>2</sup> Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (6) (1994): 1231.
- <sup>3</sup> See, for example, Richard Epstein, *The Dubious Morality of Administrative Law* (Lanham, Md.: Roman and Littlefield, 2020); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014); and Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: University of Missouri, 2017).
- <sup>4</sup> Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (1) (2017). Metzger included me among the anti-administrativists, and I share many of the confessions Aaron Nielson expressed in his response. See Aaron Nielson, "Confessions of an 'Anti-Administrativist,'" *Harvard Law Review* 131 (1) (2017).
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- <sup>6</sup> See, for example, Jon D. Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Cambridge, Mass.: Harvard University Press, 2017); Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, Mass.: Harvard University Press, 2020); and Paul R. Verkuil, *Valuing Bureaucracy: The Case for Professional Government* (Cambridge: Cambridge University Press, 2017).
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- <sup>8</sup> Philip Rucker and Robert Costa, "Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'" *The Washington Post*, February 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).
- <sup>9</sup> In summer 2020, in the wake of the killing of George Floyd and subsequent Black Lives Matter protests across the nation, the *Yale Journal on Regulation* Notice and Comment blog published more than two-dozen essays as part of its symposium on racism in administrative law. Those essays are collected at <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/>.

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- <sup>11</sup> Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, Conn.: Yale University Press, 1983). See also Nicholas R. Parrillo, ed., *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw* (Cambridge: Cambridge University Press, 2017).
- <sup>12</sup> See, for example, Gillian E. Metzger and Kevin M. Stack, “Internal Administrative Law,” *Michigan Law Review* 115 (8) (2017): 1239.
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- <sup>29</sup> Christopher J. Walker, “Administrative Law Without Courts,” *UCLA Law Review* 25 (2018): 1620.
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- <sup>47</sup> Kent H. Barnett, “Codifying *Chevron*,” *New York University Law Review* 90 (1) (2015).

# Capturing the Public: Beyond Technocracy & Populism in the U.S. Administrative State

*Avery White & Michael Neblo*

*The core problem of the administrative state is not its own legitimacy, but its role in creating a more wide-ranging legitimacy crisis in American society. The particular problem is that while government administration is necessary in a complex modern society, the mere existence of something as powerful as the bureaucracy is an invitation toward a kind of power politics that undermines the legitimacy of American government as a whole. We can best address this problem by ameliorating the administrative state's deliberative democratic deficit, whereby deliberation in the public sphere fails to play a steering role over politics at large. Doing so requires incorporating deliberative democratic practices into the American administrative state.*

**N**onauthoritarian regimes require legitimacy – the voluntary acquiescence to authority – to function well. Without legitimacy, administrative agencies, for example, would be unable to implement policy effectively. It is a potentially grave problem, then, that many observers regard the administrative state in the United States (and other consolidated democracies) as facing a “crisis” of legitimacy. Various camps differ in what they propose to do about the crisis, but they all agree on its basic origins and outlines. Populists decry the “deep state” encroaching on people’s freedoms by insulating itself from democratic accountability. Technocrats, in response, decry populists for politicizing the expert deliberation necessary to complex, modern governance. Pragmatists decry both as Manichean, while attempting to chart a middle course.

Rather than immediately taking sides in this debate, we first reexamine the nature of the crisis itself. We argue that the evidence is surprisingly weak for the existence of a crisis of legitimacy of the U.S. administrative state as a whole. Instead, the bureaucracy faces multiple, localized legitimacy crises. Specific agencies become subject to a kind of moral conflict characterized by *affective polarization* wherein we regard our opponents not merely as rivals but as enemies. If there is an overall crisis of the American administrative state, then, it results from the fact that these more local crises are becoming more intense and more common. Our

claim would seem to be a cause for pessimism: the administrative state is not typically regarded as either a cause of affective polarization or as a source of solutions; legitimacy problems, on these terms, would seem to “happen to” the administrative state, rather than be the product of some remediable institutional form.

Against this pessimistic view, we frame the legitimacy crises of the administrative state as a matter of a specific kind of *democratic deficit*: that is, a *deliberative* democratic deficit, whereby deliberation in the public sphere fails to play a steering role over politics at large. Unlike the going alternatives, we argue, first, that the potential for affective polarization is a structural feature of modern governance; second, that the administrative state plays a key causal role in explaining why liberal democracies like the United States face increasing levels of affective polarization; and third, that we can best understand the administrative state’s role in producing affective polarization as the product of a deliberative democratic deficit. Notably, none of the main approaches to the problem of administrative legitimacy provide a solution to this sort of democratic deficit, which leads us to propose our own institutional reforms.

**L**egitimacy is the voluntary recognition of authority. It exists alongside incentivizing carrots or de-incentivizing sticks: we follow the commands of a legitimate authority because we think it is the right thing to do, not merely because we stand to gain from compliance or lose from noncompliance. States, of course, govern through a combination of legitimacy and incentive structures. Many people follow the law both because they will be punished for not doing so, and because they view the law as legitimate.<sup>1</sup>

But does the American administrative state face a crisis of legitimacy? In intellectual discourse, the answer would seem to be a resounding *yes*.<sup>2</sup> We can usefully identify three broad approaches to the legitimacy crisis of the administrative state.

First, those of a libertarian, constitutional originalist, or direct democratic persuasion tell us that the administrative state is generally the enemy of the American republic, since it is not only usually unlawful, but often immoral. We would be better off to be rid of it – there is no such thing as a legitimate administrative state, at least not in its modern form.<sup>3</sup> For these critics, solving the crisis of the administrative state in institutional terms is a matter of dismantling it, as most of its functions can only be legitimately carried out through legislatures, markets, or civil society.

In contrast, supporters of technocratic expertise or a strong executive branch regard the administrative state as our ally in solving the complex problems of the twenty-first century; the only “illegitimacy” we need worry about stems from misunderstanding and ignorance or outside interference in the expert administration of professional bureaucrats.<sup>4</sup> These thinkers may acknowledge the exist-



tence of a legitimacy crisis for the administrative state as it currently exists, but view the problem as being one of not enough high-quality administration. The institutional solution is, therefore, to expand the role of the administrative state and better insulate it from problematic outside interference.

Third, pragmatic reformers simply try to muddle through successfully. For them, the administrative state is less the subject of macrotheories about the future of the American republic, and more a quasinatural fact to be accounted for, planned around, and tinkered with in the way one might approach constructing a road through a perilous mountain range. Legitimacy is then a matter of working well enough in solving concrete problems, not radical change based on comprehensive ideologies.<sup>5</sup> Institutional reforms are a matter of solving specific problems, rather than applying grand theory to the administrative state as a whole.

There is little apparent room for compromise among these three approaches: the first two are diametrically opposed on most issues, while the third views the other two as unrealistically grandiose and is itself viewed as small-minded. It is no surprise, then, that exchanges so far between the camps have been largely unproductive.<sup>6</sup> Our goal, however, is not simply to choose sides among these contenders or compromise between them. Instead we question the one point of commonality across this debate: the existence of a general crisis of legitimacy in the first place.

All three approaches not only assume the existence of a crisis, they describe it as general: that is, challenging the whole administrative state. This notion of a general legitimation crisis, though, does not track well with empirical evidence. A more adequate narrative describes the administrative state as facing multiple localized legitimacy crises regarding different and changing issue areas and groups. We can find plenty of indicators of legitimacy problems for the state as a whole, of course. But public opinion polling suggests that American attitudes toward specific administrative agencies are relatively positive, at least when compared with other political and social institutions.<sup>7</sup> Even the Internal Revenue Service (IRS) received an overall approval rating of 65 percent, and favorability toward Immigration and Customs Enforcement (ICE; the agency with the lowest approval rating) reached 46 percent; compare this with Congress at 13 percent, the Supreme Court at 40 percent, and the presidency at 39 percent.<sup>8</sup>

None of this is to say that we should ignore, for example, mass noncompliance with Centers for Disease Control and Prevention (CDC) recommendations on wearing masks during the COVID-19 pandemic, nor should we ignore the role the Tea Party has played in recent American politics, with a populist platform that takes aim at the administrative state.<sup>9</sup> It is also worth noting that the Black Lives Matter movement has contested the police functions of the state. But mere contestation does not mean that there is a full-blown legitimation crisis vis-à-vis the public at large and the administrative state as a whole.

One might worry that the analysis so far suggests that the bureaucracy is in even more peril. The administrative state might seem to face several legitimacy crises rather than just one. Perhaps this moves too quickly, though; after all, what the evidence shows is just that different groups have differing visions of what the administrative state should look like. Our concern cannot simply be that there are debates about the proper scope of government. In the absence of a general crisis, then, is there any reason to view the more specific debates concerning particular agencies and their policies as problematic?

We will say that a crisis of legitimacy exists for a given agency to the degree that its policies are met with widespread or intensive resistance.<sup>10</sup> There is no need for a bright line, but we have a crisis when resistance seriously threatens to cause the policy to fail. So, for example, the CDC is in the midst of a legitimacy crisis during the COVID-19 pandemic, as its policies have been met with widespread protests and noncompliance, which have produced precisely the spikes in cases that it was trying to avoid.<sup>11</sup> Or, to take another example, consider the negative reactions on the left to the detention policies of ICE during the Trump presidency, which included not only protests but also attempts to thwart ICE agents.<sup>12</sup> What unites these various crises is not any attribute of administration, it is not a matter of the administrative state being generally illegal or immoral or inefficient or irrational. Instead, crises are produced by a particular type of conflict, with the administrative state as the battleground.

What is it about the conflicts over CDC recommendations regarding COVID-19 or ICE's detention of immigrants that spark crises of legitimacy for those agencies? First, these are regarded as debates about principle, rather than issues of competition in pursuit of straightforward interests.<sup>13</sup> Second, the principled conflict in question is particularly *deep*; there is little or unstable middle ground for compromise. Third, the conflict has been politicized: resolution is pursued via access to an administrative agency's policy-making process. Fourth, the opponents both possess the means to create a legitimacy crisis. Fifth, the different sides in the conflict see one another as *enemies* rather than *rivals*.<sup>14</sup>

Rivals view one another as legitimate opponents, while enemies do not. Rivals' and enemies' behavior may look similar sometimes, as both will act strategically to achieve their goals. But rivals recognize their opposition's right to exist and to compete, whereas enemies simply seek to dominate one another. Rivals play to win; enemies do not think their opponent deserves to play the game. Rivals view political struggle as a legitimate means of resolving conflict precisely because the conflict itself is regarded as legitimate. By contrast, enemies view the very fact that politics enables competition as itself an illegitimate recognition of their opponents' right to compete. By recognizing one's enemy, a political institution loses legitimacy, because an enemy lacks the standing to be so recognized on legitimate grounds.

This problem can be recast in more familiar terms by noting that regarding one's opponent as an enemy is essentially a matter of affective polarization. One's political beliefs become a core part of one's identity and thereby come to be the basis for negative moral judgments about individuals who do not share those beliefs.<sup>15</sup> Those who disagree are not merely wrong, they are stupid or corrupt. Casting political enmity in these terms is useful precisely because there is a large literature that finds increasing affective polarization in the American public over time, specifically along partisan lines between self-identified Democrats and Republicans.

The real threats to the legitimacy of the administrative state are therefore tied up with an issue that arises from outside of the administrative state itself. Moreover, existing suggestions for how to reduce affective polarization do not involve much of a role for the administrative state.<sup>16</sup> It would appear, then, that the administrative state might have to treat legitimacy like the weather: as something that happens to agencies regardless of their own behavior. If this is the case, then there is not much to be done; the legitimacy crises are likely to get worse before they get better, and there is nothing much that the administrative state can do about it.

We do not think the administrative state is so lacking in agency vis-à-vis its own legitimacy that the story ends there. Indeed, we argue that the administrative state is a major structural catalyst of affective polarization, and that the bureaucracy plays this role because of a major deliberative democratic deficit. In other words, the problem is not the administrative state becoming politicized per se, but rather that it has become politicized in the wrong way.

To build our argument, we need to define four related concepts: practical reason, the lifeworld, deliberation, and the public sphere.<sup>17</sup> *Practical reason*, as opposed to instrumental or technocratic rationality, is concerned not only with evaluating the most efficient means to given ends, but also with the reasonableness of the ends themselves. The core question for practical reason in politics is "What should we do?" (rather than "How do I get what I want?"). We exercise practical reason in the context of the *lifeworld*, which consists of the unspoken, shared understandings that serve as the background people rely on to coordinate their actions.<sup>18</sup> In politics, we exercise practical reason via a particular method of interaction: namely, *deliberation*, which in its simplest form involves individuals discussing what to do with one another in good faith and as equals in order to come to a mutual understanding.<sup>19</sup> The *public sphere* is constituted by the whole of this discourse and is the space in which genuinely public opinion can form (rather than merely aggregated private opinions). If the lifeworld provides the background that enables us to communicate effectively, deliberation is the exercise of that potential in order to solve particular problems. Legitimate so-

cial coordination is the product of practical reason, exercised via deliberation in the public sphere, and conducted against the background of the lifeworld. Legitimacy will be lost, at least in the long term, without deliberation, because it is only through deliberation in the public sphere that we can realize our considered ends in a mutually consistent way.<sup>20</sup>

Modern societies have become larger and more complex, and individuals increasingly fill specialized social roles differentiated from one another based on attributes like class, gender, race, ethnicity, and education, but also more mundane things such as what kind of music one listens to. All of this social differentiation tends to fracture the lifeworld such that coordinating action becomes more difficult.<sup>21</sup> Thus, while the immediate causes of affective polarization might be things like a 24/7 news cycle, the rise of social media, or geographic sorting on factors that track partisanship, these explanations function within a wider societal context in which the traditional sources of solidarity have been undermined and people are casting about for alternatives.

The problem facing liberal democracies like the United States, then, is that they have come to be governed not by practical reason channeled through the public sphere and then into political institutions, but by various forms of technical rationality, which take ends as given and simply go about pursuing them in the most efficient way possible.<sup>22</sup> How has technical rationality come to replace practical reason as the coordinating mechanism? The technical rationalities of the market and the administrative state gradually come to replace spheres of life that were formerly part of the lifeworld. Regarding the administrative state in particular, philosopher Jürgen Habermas describes it as operating according to a technical rationality of power.<sup>23</sup>

The notion of technical rationality does not mean that Habermas thinks the substance of administration is simply the exercise of power. The point of a welfare state, for example, is not to exercise power over the recipients of welfare, it is to provide the needy with necessary aid. But the mere existence of an administrative state creates an opportunity for those who wish to dominate by controlling the bureaucracy. Groups can gain access to the machinery of the administrative state and then employ the bureaucracy to achieve their private goals. For example, whoever wins a presidential election gains control of the administrative state. Moreover, the administrative state has a tendency to continuously expand its scope in response to novel problems. But these conditions are not enough to induce a crisis of legitimacy because winning elections and expanding agency purviews could occur under the auspices of democratic deliberation.

The real problem emerges when competition over access to the administrative state comes to replace or preclude steering via deliberation in the public sphere. The process begins with the creation of a new administrative agency designed to solve some social problem, perhaps in response to public demand. The new bu-

reaucracy then starts to implement whatever sort of regulation or welfare services it was tasked with providing. So far, practical reason is still at least potentially the guiding force. The question arises, however, as to how to distribute the costs and benefits of the new regulation or welfare program. Public deliberation is one means of resolving this question. But now, this deliberation takes place against a background of power politics. All the parties know that they could, if they chose, forgo deliberation and attempt to access the administrative state through an exercise of power, an option that was not available in this domain before the creation of the new agency.

The effect of this backdrop of power politics is to make all the parties to deliberation aware of the possibility that deliberation itself could play a role in the balance of power: any party might decide to forgo deliberating in good faith and instead attempt to exploit the good faith of others to improve their own bargaining position.<sup>24</sup> The result, all else equal, is reduced trust between the parties to deliberation. In light of this reduced trust, parties might want to guard against being taken advantage of; the incentive is to work to shore up their own power base. One side's improvement of its power position comes at the expense of the other parties, should discussion turn sour. In other words, one party engaging in mere preparation for an exercise of power, even if only to resist the power of another, requires all the other parties to make similar preparations, unless they are willing to accept a reduced chance of accessing the administrative agency should deliberation fail.

Furthermore, the social practice necessary to enable good faith communication between the parties with regard to managing the win-or-lose logic of power politics – namely, deliberation in good faith – is precisely the social practice that the logic of power erodes. And once caught in this progression, it is unclear how to escape the cycle without forfeiting one's own chances of achieving victory; in other words, the only alternative to the competition over power seems to be an instrumentally irrational abrogation of power politics, which unless it occurs in the context of mutual disarmament, would simply make it easier for one's opponent to turn from deliberation to power. Indeed, the only way out of this logic would seem to be forgoing the creation of the new administrative agency entirely. But this would require whichever party had the power to create the agency in the first place to forgo the benefits of doing so, and for successors to that initial party to continue to forgo maximizing the potential benefits of control over the agency for increasing their own power, thereby reducing their own ability to resist the power of others. Power politics is a zero-sum game, and one cannot avoid playing by the rules unless they are willing to acquiesce to potential domination by others.

The outcome of this logic of power politics is that, all else equal, deliberation becomes increasingly difficult over time. But as noted, deliberation is the only stable source of legitimacy for social coordination. Taken together, this suggests that

over time, a particular area of social coordination dominated by power politics will tend to become less and less legitimate. It will be more and more difficult for the parties to a particular sphere of social coordination to come to a mutual understanding. If parties become unintelligible to one another, then it is easy to see how affective polarization could take root. To the degree that mutual understanding is lacking, opponents will appear as not just misguided, but as not guided by reason at all. The problem is that, because deliberation is displaced by technical rationality, groups are in a sense correct in assessing their opponents as unreasonable (though they rarely apply the same assessment to themselves). We lack the resources to use deliberation in the public sphere to assess our common goals, and therefore our opponents will find us immune to reason. Thus, they will feel forced to rely on the rationality of power.

Affective polarization, then, is a natural outcome of mutual unintelligibility between Democrats and Republicans. The reason that social media or geographic sorting might produce affective polarization is that they serve to reduce mutual intelligibility. This mutual unintelligibility has also arisen alongside a turn toward increasingly pure forms of power politics (such as obstructing Merrick Garland's appointment to the Supreme Court). Both elites and average citizens feel less compunction against violating informal norms of civility and restraint (what political scientists Steven Levitsky and Daniel Ziblatt call "forbearance").<sup>25</sup> Far from being like inclement weather, though, the administrative state plays a causal role in the rise of affective polarization and thereby its own legitimacy crises.

If the problem of affective polarization has its origins in a deteriorating life-world, then we can say that the legitimacy crises facing the administrative state are ultimately issues of a deliberative democratic deficit. The point is for the polity as a whole to be steered via popular deliberation, but this does not mean that we must replace our current institutions of government with mass deliberative bodies. Instead, we need to evaluate how various parts of the system, even if they are not directly deliberative themselves, can work together.<sup>26</sup> So a deliberative democratic deficit does not mean that an administrative state constituted by career bureaucrats is necessarily inimical to achieving a better system. The question, instead, is how an administrative state can effectively contribute to the deliberative quality of the system overall.<sup>27</sup> A deliberative democratic system would still likely need to have plenty of sites where actual, face-to-face deliberation occurs, but the administrative state can contribute to this project without itself being an essentially deliberative democratic institution.

Compare this approach to concerns about a democratic deficit without the deliberative modifier, such as have been raised regarding the European Union, and which seem to undergird concerns regarding the American administrative state.<sup>28</sup> Normally, a democratic deficit exists as a commonsense notion that unelected officials present a problem for the legitimacy of a given political institution. But it is



possible to have a standard democratic deficit and not a deliberative democratic deficit, and vice versa. Mere elections are inadequate to produce legitimacy, precisely because, as contests of political power, they can present a means of crowding out deliberation. And in contrast, one could well be concerned that a form of democracy without elections is not really democracy at all, no matter how deliberative, if the relationship between citizens and the government in such a situation is too attenuated.

To see this, consider that not all the components of a jury trial are deliberative. The process uses an antagonistic relationship between the lawyers to promote deliberative ends in the process as a whole. Lawyers are obligated to try to defeat their opponents by any legal means. Yet this central antagonism is controlled by the judge, setting limits on the contest and thereby ensuring that the consensus-generating device of the jury itself is not corrupted by the unfettered desire of both parties to win. The jury itself must reach consensus on what to do, and it can come to compromise solutions when faced with multiple charges or making sentencing proposals. A successful jury trial, then, employs adversarial means to produce a deliberative end.

Yet even with the institutions of a judge and jury in place, not to mention hundreds of years of practice in the conduct of jury trials, it is still not uncommon for the institution to “get it wrong.”<sup>29</sup> We should be dubious, then, that the political system, which is vastly more complex, does not face similar problems. This does not mean that the Constitution is not an impressive achievement, nor that it is unnecessary, but it is to suggest that its organizational capacities have been stretched to their limits over the course of its nearly 250 years. In other words, the Constitution is necessary, but likely not sufficient, to ensure that American politics is a deliberative system. The existence of legitimacy crises not only for the administrative state but also for American democracy suggests that, indeed, the antagonistic technical rationalities of competition over power and money are not well managed, and that major reform may be necessary.

The anti-administrative state position subordinates deliberation to democracy, while the pro-administrative state position subordinates democracy to deliberation. The problem is that unless we have both deliberation and democracy, legitimacy crises will recur and escalate over time. The third, “pragmatic” approach attempts to balance democracy and deliberation, but conceives of them in zero-sum terms, rather than as mutually constitutive. What is needed, then, is a specifically deliberative democratic solution to the problem of the specifically deliberative democratic deficit.

“Micro”-techniques of deliberative democracy are already being applied in public administration, though usually as a temporary and substantively bounded experiment. We briefly assess their record and recom-

mend that administrative agencies consider making them a more consistent component of the policy-making process. In addition, we argue that these microlevel deliberations can come to serve a macrolevel function in addition to their direct benefits. Just as jury trials enable citizens to better understand and appreciate the workings of the judiciary, so too can microdeliberations aid the cause of civic education. In addition to contributing to a better understanding of the administrative state, widespread participation in the conduct of governance could provide a countervailing force against affective polarization. Finally, because affective polarization is exacerbated by the winner-take-all nature of access to control over the administrative state, we recommend applying the institutional attributes that characterize “independent” federal agencies more broadly within the administrative state. Independent agencies carry several institutional features that insulate them from control by any presidential administration and enforce consensus decision rules within the agency itself, both of which can be helpful means of avoiding the pernicious logic of power politics.

Techniques such as citizen assemblies, participatory budgeting, deliberative town halls, policy juries, and deliberative polling have been employed around the world in a variety of political contexts.<sup>30</sup> What primarily ties these different approaches together is that they consist of discrete deliberations among specific people; it is in this sense that they are microtechniques of deliberative democracy. That is, these techniques attempt to implement deliberation in its most direct form – namely, discussion among citizens on some particular issue – with the aim of replacing the capture of administrative agency policy-making by elites and interest groups with “capture” by considered public opinion. In this way, current efforts at implementing deliberative democracy can be seen as an effective supplement to the institution of “notice and comment,” which was meant to expand public access to administration but mostly served organized interests.

These techniques have been quite successful in several respects.<sup>31</sup> First, it seems as though achieving “real” deliberation is not only possible, but not particularly difficult with proper planning. Second, when placed in deliberative situations, citizens routinely manage to outperform the expectations of some of deliberative democracy’s more pessimistic critics. Participants typically manage to behave civilly and reasonably, and grasp complex issues when aided by experts. And even if they cannot reach a full consensus, participants typically report that they view the final difference of opinion as a matter of legitimate disagreement between reasonable parties rather than falling prey to the logic of affective polarization. Third, the final consensus (or informed dissensus) of deliberation has proven useful to those political institutions that have employed such techniques: for example, the final budgets produced by participatory budgeting processes function well and gain widespread support, and both elected officials and their constituents who participate in deliberative town halls report high satisfaction

with the proceedings. Deliberative democratic techniques have produced valuable results for participants, the public at large, and political elites. Nevertheless, we do not dwell on these outcomes here because they have been extensively treated elsewhere.

Rather, our argument is that their value may well extend beyond these known benefits. We can also employ them as a form of civic education, with the goal of providing a countervailing force against the logic of power politics and affective polarization. Such techniques could help citizens to appreciate how difficult the actual conduct and implementation of politics and policy are. By participating in the actual process of government, even if only in a limited way, individuals can come to see that politics is difficult, and that power is not as easy to wield over one's opponents as it might initially seem to a casual observer. For this to work, there needs to be something like mass participation in deliberation, and at a frequent enough rate to serve as an effective countervailing force against the logic of power politics. The point here is how deliberation benefits citizens directly, rather than how it can be used to better connect citizens with political elites, as valuable as that might be as well.

The administrative state would serve well as the site for this kind of large-scale institutionalization of deliberation. First, the administrative state is where most actual policy-making takes place, not to mention where such policies are applied to real world situations. Furthermore, the administrative state has resources in terms of personnel and physical infrastructure that other components of American government lack; the Supreme Court, for example, simply could not support large-scale deliberative institutions. Hard questions remain, of course. In particular, we need to consider how to fund and staff deliberations at the necessary scale and, further, how to encourage mass participation itself (few people think they will enjoy jury duty, after all). But the possible benefits of expanding deliberation should not be ignored, both in terms of making compromise more likely, and as a means of directly attacking affective polarization.

As noted above, affective polarization becomes especially pernicious when one or both opponents think they can come to dominate the other side, rather than merely wishing that they could do so. The possibility of achieving such a sweeping political victory is, of course, encouraged by politicians. Part of the solution is to help citizens better evaluate these kinds of claims via civic education. But another institutional response is to actively work to weaken the kind of winner-take-all decision rules that make a total victory seem possible. Winning an election and "winning" the overall contest with the opposing side in society are two quite different things, but the possibility of the former can make it easier to think that the latter is within reach. The problem is that we then simply contribute to greater affective polarization and a more fragmented lifeworld. Nor are the policies generated through this process particularly effective, precisely because barely

winning with regard to one majoritarian decision rule suggests that it is likely that one will not win the next contest decided by that rule, an outcome that could see the reversal of all of one side's policies in favor of one's opponent's policies. This is what we have seen, for instance, with regard to recent executive orders.<sup>32</sup> Long-term policy planning is quite difficult when a new party gains something like total institutional control.

To solve these two problems we propose the expansion of a particular institutional form: so-called independent agencies. Such agencies are already widely used in American government, with the Federal Reserve system presenting the most obvious example. These institutions vary in their structure, but they tend to share certain features that both insulate them from the effects of winner-take-all decision rules (in this case, presidential elections), and enforce compromise or consensus decision-making within the agency itself.

With regard to dampening the lurches of the administrative state, there are two relevant institutional features of independent agencies. First, they tend to be run by boards consisting of several individuals, rather than a single appointed figure like a cabinet secretary.<sup>33</sup> Furthermore, the people serving on these boards are typically not all appointed by any single administration. Second, the board members tend to be removable by the president only for cause. Thus, a president cannot simply sweep into office and "clean house" at independent agencies like the Federal Reserve or the National Labor Relations Board. However, this is not the same as insulating independent agencies from politics, which would itself raise questions of legitimacy among those who reasonably worry about normal democratic deficits. Board members do not form a body like the Supreme Court, with lifetime appointments and removal only via impeachment; they are therefore subject to some of the same pressures as elected officials. The point is not to excise politics from the practice of administration, but to reduce the role of a particular kind of political contest that takes the form of winner-take-all decision rules. Indeed, in contrast with the Federal Reserve, the purpose of these "deliberative" boards would be less to ensure technocratic expertise, and more to ensure that considered public opinion receives due weight in the conduct of administration.

The second important feature of independent boards is that they tend to require some sort of consensus to make decisions. The goal is to ensure that enough members of a board agree on a particular policy or decision that at least one board member previously appointed by the opposing party is involved. Of course, some decisions may require something closer to unanimity, though the closer one gets to unanimity, the more likely a deadlock becomes. This is especially true since the board members at independent agencies serve as their full-time jobs, unlike in the case of a jury where its participants generally want to get the process over with so they can go back to their normal lives. The point here is to reduce the benefits of victory and the costs of defeat with regard to presidential elections.

Of course, not all administrative agencies are good candidates for this kind of institutional form. Perhaps the Department of State, for example, would be better organized as an extension of the president's will. But the Department of State is relatively unusual in this regard, and even there, while a full transformation into an independent agency is a poor idea, the incorporation of such boards into the agency at a lower level might well be helpful. For instance, we might think that presidents should be able to determine their own foreign policy, but should not be able to simply remove the United States from its international obligations at will. Some agencies, however, do seem amenable to a more thoroughgoing transformation into independent bodies: the Environmental Protection Agency (EPA), for instance, is often a site for policy whiplash between Democratic and Republican administrations, though losing direct control over the EPA does not seem to carry problematic implications for the president's powers in an emergency as the executive. It is worth considering, then, that the full transformation of an agency like the EPA into an independent agency would have beneficial consequences in attenuating the logic of power politics.

Of course, these changes, while in one sense radical, would not be enough on their own to eliminate legitimacy crises for the administrative state. But in combination with our other institutional suggestions, we hope that we have shown how the administrative state could play an important role in resuscitating a public sphere damaged by the affective polarization that the rise of the administrative state itself has driven.

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## ENDNOTES

- <sup>1</sup> On legitimacy, we draw in particular on the work of Tom R. Tyler, *Why People Obey the Law*, rev. ed. (Princeton, N.J.: Princeton University Press, 2006); and Tom R. Tyler, *Why People Cooperate: The Role of Social Motivations* (Princeton, N.J.: Princeton University Press, 2011).
- <sup>2</sup> Phillip Wallach, “The Administrative State’s Legitimacy Crisis,” The Brookings Institution, April 20, 2016, <https://www.brookings.edu/research/the-administrative-states-legitimacy-crisis/>; Mark Bevir, “Legitimacy and the Administrative State: Ontology, History, and Democracy,” *Public Administration Quarterly* 37 (4) (2013): 535–549; Ryan Calo and Danielle Keats Citron, “The Automated Administrative State: A Crisis of Legitimacy,” *Emory Law Journal* 70 (4) (2021); K. Sabeel Rahman, “Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,” *Harvard Law Review* 131 (6) (2018): 1671–1712; Gillian E. Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017): 1–95; and Maggie McKinley, “Petitioning and the Making of the Administrative State,” *Yale Law Journal* 127 (2018): 1538–1637.
- <sup>3</sup> For recent work in this vein, see, for example, Richard A. Epstein, *The Dubious Morality of the American Administrative State* (Lanham, Md.: Rowman & Littlefield, 2020); Phillip Hamburger, *Is the Administrative State Unlawful?* (Chicago: University of Chicago Press, 2014); Charles Murray, *By the People: Rebuilding Liberty without Permission* (New York: Crown Forum, 2015); and Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (Columbia: University of Missouri Press, 2017). For a review of judicial decisions in accord with this general anti-administrative state approach, see Cass R. Sunstein and Adrian Vermeule, “Libertarian Administrative Law,” *University of Chicago Law Review* 82 (1) (2015): 393–473.
- <sup>4</sup> For recent arguments in favor of a strong administrative state, see Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010); and Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Cambridge, Mass.: Harvard University Press, 2016). More moderately, see Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Random House, 2005); Cass R. Sunstein, *The Cost-Benefit Revolution* (Cambridge: The MIT Press, 2018); Cass R. Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013); and Cass R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (New Haven, Conn.: Yale University Press, 2014). See also Daniel Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford: Oxford University Press, 2014); Jerry Mashaw, *Creating the Administrative Constitution* (New Haven, Conn.: Yale University Press, 2012); Jon D. Michaels, “The American Deep State,” *Notre Dame Law Review* 93 (4) (2018): 1653–1670; and Cass R. Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, Mass.: Belknap Press, 2020).
- <sup>5</sup> For contemporary work in a pragmatic key, see, for example, Wallach, “The Administrative State’s Legitimacy Crisis”; Christopher DeMuth, “Can the Administrative State be Tamed?” *Journal of Legal Analysis* 8 (1) (2016): 121–190; Metzger, “1930s Redux”; Aaron L. Nielson, “Confessions of an ‘Anti-Administrativist,’” *Harvard Law Review Forum* 131 (1) (2017): 1–12; and Mila Sohoni, “A Bureaucracy—If You Can Keep It,” *Harvard Law Review Forum* 131 (1) (2017): 13–31.



- <sup>6</sup> We are referring here specifically to the exchange between Vermeule and Hamburger found in Adrian Vermeule, “No,” *Texas Law Review* 93 (2015): 1547–1567; and Phillip Hamburger, “Vermeule Unbound,” *Texas Law Review* 94 (2016): 205–230.
- <sup>7</sup> Pew Research Center, “Public Expresses Favorable Views of a Number of Federal Agencies,” October 1, 2019, <https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/>; Pew Research Center, “Public Holds Broadly Favorable Views of Many Federal Agencies, Including CDC and HHS,” April 9, 2020, <https://www.pewresearch.org/politics/2020/04/09/public-holds-broadly-favorable-views-of-many-federal-agencies-including-cdc-and-hhs/>; and Gallup, “Confidence in Institutions,” 2020, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.
- <sup>8</sup> To be clear, the first poll gauges “favorable opinion” of particular agencies, while the second poll gauges “confidence” in the relevant institutions.
- <sup>9</sup> Ilya Somin, “The Tea Party Movement and Popular Constitutionalism,” *Northwestern Law Review* 105 (2011): 300–314.
- <sup>10</sup> Of course, agencies can face crises of confidence that do not implicate their political legitimacy, but instead their competence. Consider, for example, FEMA’s ineffectual response after Hurricane Katrina in 2005.
- <sup>11</sup> Eric Lipton, Abby Goodnough, Michel Shear, et al., “The CDC Waited ‘Its Entire Existence for This Moment.’ What Went Wrong?” *The New York Times*, June 15, 2020, <https://www.nytimes.com/2020/06/03/us/cdc-coronavirus.html>.
- <sup>12</sup> Alexandra Yoon-Hendricks and Zoe Greenberg, “Protests Across U.S. Call for End to Migrant Family Separations,” *The New York Times*, June 30, 2018, <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html>.
- <sup>13</sup> Amy Guttmann and Dennis F. Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press, 1998). See also Georgia Warnke, *Legitimate Differences: Interpretation in the Abortion Controversy and Other Public Debates* (Berkeley: University of California Press, 1999).
- <sup>14</sup> This distinction is informed by work on “agonistic” democracy. See Chantal Mouffe, *Agonistics: Thinking the World Politically* (New York: Verso, 2013).
- <sup>15</sup> For an up-to-date review of the literature on affective polarization, see Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, et al., “The Origins and Consequences of Affective Polarization in the United States,” *Annual Review of Political Science* 22 (2019): 129–246.
- <sup>16</sup> *Ibid.*
- <sup>17</sup> The following discussion draws notably on the work of Jürgen Habermas, especially *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: The MIT Press, 1996).
- <sup>18</sup> *Ibid.*, 21–23.
- <sup>19</sup> *Ibid.*, 157–168.
- <sup>20</sup> *Ibid.*, 68.
- <sup>21</sup> *Ibid.*, 25.
- <sup>22</sup> *Ibid.*, 27.

- <sup>23</sup> Ibid., 39–40.
- <sup>24</sup> This problem is quite clear in the context of international politics. See Thomas Risse, “‘Let’s Argue!’ Communicative Action in World Politics,” *International Organization* 54 (1) (2000): 1–39.
- <sup>25</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Broadway Books, 2018).
- <sup>26</sup> On this approach to deliberative democracy, see John Parkinson and Jane Mansbridge, eds., *Deliberative Systems* (Cambridge: Cambridge University Press, 2013); and Michael A. Neblo, *Deliberative Democracy between Theory and Practice* (Cambridge: Cambridge University Press, 2015).
- <sup>27</sup> On communication and the flow of practical reason between political institutions, see Michael A. Neblo and Avery White, “Politics in Translation: Communication between Sites of the Deliberative System,” in *The Oxford Handbook of Deliberative Democracy*, ed. Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (Oxford: Oxford University Press, 2018).
- <sup>28</sup> For applications to the U.S. context, see Jeffrey R. Lax and Justin H. Phillips, “The Democratic Deficit in the States,” *American Journal of Political Science* 56 (1) (2012): 148–166; and Sanford Levinson, “How the United States Constitution Contributes to the Democratic Deficit in America,” *Drake Law Review* 55 (2006): 859–878.
- <sup>29</sup> Brian H. Bornstein and Edie Green, “Jury Decision Making: Implications for and from Psychology,” *Current Directions in Psychological Science* 20 (1) (2011): 63–67.
- <sup>30</sup> Bächtiger et al., *The Oxford Handbook of Deliberative Democracy*.
- <sup>31</sup> For a review of the positive qualities and outcomes of deliberative democratic techniques, see Michael A. Neblo, *Deliberative Democracy Between Theory and Practice* (Cambridge: Cambridge University Press, 2015); and Susan Dorr Goold, Michael A. Neblo, Scott Y. H. Kim, et al., “What Is Good Public Deliberation?” *Hastings Center Report* 42 (2) (2012): 24–26.
- <sup>32</sup> Juliet Eilperin and Darla Cameron, “How Trump Is Rolling Back Obama’s Legacy,” *The Washington Post*, January 20, 2018, <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/>.
- <sup>33</sup> The U.S. Supreme Court has recently ruled in the *Seila* case that the heads of administrative agencies cannot have both for-cause protections and singular leadership (rather than a board), nor can such agencies go beyond “quasilegislative” or “quasijudicial” functions. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. \_\_\_\_ (2020).

# The Uncertain Future of Administrative Law

*Jeremy Kessler & Charles Sabel*

*A volatile series of presidential transitions has only intensified the century-long conflict between progressive defenders and conservative critics of the administrative state. Yet neither side has adequately confronted the fact that the growth of uncertainty and the corresponding spread of guidance – a kind of provisional “rule” that invites its own revision – mark a break in the development of the administrative state as significant as the rise of notice-and-comment rulemaking in the 1960s and 1970s. Whereas rulemaking corrected social shortsightedness by enlisting science in the service of lawful administration, guidance acknowledges that both science and law are in need of continual correction. Administrative law has the resources to ensure that the provisionality of guidance does not lead to the abuses that conservatives fear. But to deploy those resources – and to carry through the reforms of administrative organization that are their natural complement – progressives must rethink their commitments to judicial deference to administrative authority and administrative deference to presidential authority, commitments on which the progressive defense of the administrative state currently depends.*

**I**n an interregnum, as the old order subsides and the new order struggles for definition and recognition, debate is often Janus-faced: now looking backward in an anguished attempt to save the receding world or put it in its best light; now looking forward to make the most of the possibilities for renewal that the emergent world affords. Such is the situation in American administrative law today. Under pressure for decades, the vulnerabilities of the administrative state were cast in harsh relief by the electoral victory of Donald Trump. This victory helped reveal and accelerate the erosion of public confidence in traditional models of growth and social mobility, the institutions of government, and the governing elite. The return of the White House to Democratic control will do little to abate this erosion. Within the legal academy and the federal judiciary, the long-smoldering debate between progressives and libertarian-minded conservatives over the New Deal legacy has burst into flames. Progressives defend current arrangements – and the internal operations of the administrative state in particular – as harmonizing professional expertise, energetic presidential direction, and

the rule of law. Their opponents see an autonomous administrative state, largely playing by the rules that administrators have created for themselves, as a growing threat to the balance of judicial authority, legislative sovereignty, and presidential democracy on which constitutional freedoms depend. This debate can be so absorbing that its participants – losing sight of the mixture of achievements and shortcomings that make the actual administrative state a vexation, but perhaps a tolerable one, for the public – come to suspect that but for the machinations of the other side, there would be no real problem at all.

But alongside this first debate is a second, focused resolutely, yet without fanfare, on what administrative law can or should become. Its point of departure is the growing importance of uncertainty – the inability to anticipate future states of the world with enough confidence to assign them probabilities – to administrative decision-making. As is often the case in the early stages of epochal change, there is little attempt to give precise definition to the shift in progress, measure its extent, or explain its causes. Instead we are confronted with arresting descriptions of new developments, counterintuitive to the world we thought we knew and inexplicable but for the postulated break with the past.<sup>1</sup>

For one leading commentator, Adrian Vermeule, the rise of uncertainty turns many substantive decisions into “coin flips,” foreclosing the reasoned ranking of alternatives or “first order” reason-giving that makes administrative decisions orderly and intelligible to reviewing courts. Outcomes will depend on “second order” considerations having nothing to do with the law, such as the determination that, right now, any decision is better than none, or that one policy is more easily administrable than equally imperfect alternatives.<sup>2</sup> Judges, recognizing this limit, should – and, more often than not, do – defer broadly to administrative discretion rather than futilely interrogate administrative actions that cannot be justified on conventional grounds. For Vermeule, a strong administrative state, freed by the judges themselves of all but the most minimal judicial check, is indispensable for realizing the popular will in otherwise uncertain times. That such a state does not conform to liberal democratic norms is no loss for Vermeule; that it invites domination by strong, popular leaders is if anything a gain.

For administrative law scholar Nicholas Parrillo, by contrast, the effect of uncertainty on the administrative state has been the “oceanic” spread of guidance: a provisional form of regulation that tentatively advises private parties and public officials about how an agency intends to exercise its discretion or interpret its legal authorities.<sup>3</sup> In issuing guidance, an agency can give regulated entities an understanding of what compliance means right now, without committing itself to what will be required of regulated entities in the near future, should conditions change or new facts come to light. The public and private practitioners whose views inform Parrillo’s account regard guidance as “essential to their missions.” A former senior Food and Drug Administration official “cannot imagine a world

without guidance”; according to one current Environmental Protection Agency official, guidance is “the bread and butter of agency practice.”<sup>4</sup>

But just as a firm, having achieved economies of scale for efficiency reasons, may use its size to compete unfairly, so Parrillo finds that the use of guidance as a legitimate response to uncertainty can open the way to abuse. To advance their own institutional interests or win the favor of particular constituents, administrators may use guidance too flexibly, avoiding the procedural burdens that normally must be assumed to change policy, and frustrating the consistency required by the rule of law. Or administrators may use guidance too inflexibly, knowing that, once issued, guidance creates *de facto* legal obligations and permissions, and thus as a practical matter can regulate with the force of law while again evading the procedures normally required to do so – and often judicial scrutiny as well.

For Parrillo, judicial efforts to winnow the good uses of guidance from the bad have reached their limit. If guidance is to serve as an adaptive response to uncertainty while limiting the risks of abuse, the administrative state should itself be reformed to further develop the institutional capacity for continuous but lawful adjustment to change and variety. Parrillo calls this capacity “principled flexibility”: a method of decision-making in which requests for the revision of guidance are easily made (reducing the risk of expedient compliance by habit) and exposed to appropriate discussion within the agency and its public (reducing the risks of clientelism). Principled flexibility implies an innovation in administration, already visible in some agencies, that connects front-line decision-makers with their superiors, on the one side, and regulatory parties and beneficiaries, on the other, to ensure an integration of rule-application (or enforcement), rule-making, and rule-revision that conforms to the public interest and the rule of law, not simply to the self-interest of an agency as an organization or its lobbies.

Neither Vermeule’s nor Parrillo’s views provide anything approaching a comprehensive vision of a future administrative state, nor were they intended to do so. In important ways, they are in error. But they do clear a path to exploring how, in response to deep changes in the very circumstances of decision-making, administration has begun to purposefully adapt, and might well emerge from the interregnum better equipped to meet, effectively and legitimately, the demands of a volatile world. That is the path that we follow and try to extend in this essay.

We begin with the premise that the growing reliance on guidance – a kind of provisional “rule” that invites its own revision or qualification – marks a break in the development of the administrative state on the order of the transition from regulation by case-by-case adjudication to regulation by notice-and-comment rulemaking in the 1960s and 1970s. Where rulemaking aimed to correct social shortsightedness by applying science in the service of lawful administration, guidance – sprung from uncertainty – enables administration in the public inter-

est when both science and law are recognized as themselves in need of continual correction. Guidance is the kind of law that uncertainty admits.

The centrality of guidance to contemporary administration, in turn, calls into question politically progressive defenses of the administrative state. These defenses ground the legality and legitimacy of administrative decision-making in the technical authority of professional administrators and the democratic authority of their political superiors, two forms of authority that are harmonized and largely self-disciplined by internally generated hierarchical norms, which also serve as a shield against intrusive judicial review. Today, such deference to authority and hierarchy seems incautious, even reckless. Even when understood as a strategic bargain, necessary to protect the autonomy of the administrative state from a judiciary suspected, often rightly, of congenital animosity to administration itself, the progressive defense resembles a pact with the devil.

The emerging law of guidance, and the reality of uncertainty to which it responds, points toward a different, and more defensible, conception of the administrative state, one that is aware of its own fallibility, that routinely invites challenges to its technical and political authority, and that continually responds to these challenges with reasons that are legible to the courts and to the public at large.

This is an essay in reinterpretation, and exploratory reinterpretation at that. Few if any of the observations or references to empirical developments are original to us. What is different is the perspective. Most commentators, and especially the ones from whom we have learned the most, strive to fit guidance within an overarching structure of mutually reinforcing doctrinal and organizational elements: the traditional administrative state, put in its best light. When the fit is awkward, the commentators, as the excellent lawyers they are, explain the discrepancy while preserving the structure. We see the same incongruities and ask instead if they might not prefigure a new frame and, if so, how elements of a reconfigured administrative state might fit into *it*. We go just far enough in that direction, we hope, to suggest the plausibility of switching figure and ground.

**T**hough we want to show that the increase in uncertainty puts tectonic pressure on the administrative state, we begin by arguing that legal reasoning, of the kind familiar to appellate courts, does not run out under uncertainty. In suggesting otherwise, Vermeule adopts the vantage point of the lone judge or administrator, deciding cases on the basis of records whose quality gradually degrades as new and puzzling circumstances arise, beyond the range of current understanding. When familiar sources of evidence become less reliable or irrelevant, the only way to decide is by tossing a coin or appealing to second-order reasons.

But uncertainty does not come to agencies in isolated instances or as a gathering nebulosity that defeats understanding. It arrives as a trickle, then a stream,



and then a flood of indications that new approaches are needed. Often it is the agency itself that makes the limits of knowledge manifest and actionable, by proposing to set a standard at or beyond the frontier of technology and, in doing so, calling attention to the uncertainty that must be overcome to make compliance eventually possible. Either in response to puzzling novelty or as part of a deliberate effort to press beyond the known, the agency actively seeks the cooperation of all the actors in a position to learn a way through uncertainty. Such cooperation is likely to be forthcoming as regulators, regulated entities, and the beneficiaries of regulation, jointly ignorant of the risks they may face, share a vulnerability that can motivate joint action.<sup>5</sup>

There should be nothing surprising in such a reaction. We expect the rational actor, facing uncertainty, to inquire after further information the better to direct action. Nor should it be surprising, however, that organizing such inquiry is easier said than done. Ideally, when decisions are reversible and information is easily available, action and inquiry can proceed together, so that initial decisions are corrected without loss in light of later knowledge, even if, that too, remains provisional. In fact, information is typically costly to acquire – not least because at the outset of inquiry it is not clear what needs to be known – and decisions can turn urgent and irreversible. Furthermore, inquiry can and from time to time does fail, though failure does not discredit the enterprise as a whole, any more than science as a whole is discredited by its reverses. In practice, what is called for in the face of uncertainty is “measured action,” in which each step is intended to inform the next.<sup>6</sup> We can think of measured action as straddling the boundary between first- and second-order reasons, or, rather, devising by second-order considerations the means for enabling first-order choosing. Reducing administration to a choice between first- and second-order decision-making ignores the core of what administrators do.

A prerequisite of measured action in regulatory settings is the formation of regimes that signal when and where further inquiry is opportune or urgent, and when additional measures must be taken to further defer final decision or to act decisively.<sup>7</sup> Regimes directed to this purpose arise, for example, when regulators: induce monitoring of ecosystems for the protection of particular species or the environment generally; mandate extensive reporting of the failures or side effects of products authorized for sale to detect latent hazards; or organize information-pooling to set or reset (technology-forcing) limits on permissible levels of pollution as knowledge of what counts as dangerous exposure to the pollutant, the technologies of pollution control, and the costs of the latter change rapidly and unpredictably.<sup>8</sup> Often resource constraints hamper formation of these regimes; sometimes their operation is frustrated by raw conflicts of interest or the very rigidities of administrative law that we will discuss in relation to guidance.<sup>9</sup> In the best cases, such regimes allow the agency to cooperate with outside actors – firms,

NGOs, property owners, other public bodies – to learn what can be known; together they find a way through uncertainty that none could have found alone.

Are the reasons given to explain and justify the choice of a particular variant of this kind of rulemaking process, or to evaluate its performance with regard to a given outcome, unintelligible to lawyers generally, and especially to courts? It is hard to see why. Evaluation of first-order reason-giving will focus on the validity of the process by which reasons are produced, because it is easier for outsiders to judge the suitability of the decision-making process than the substance of an arcane decision. Such outsiders can be expected to ask: Has there been an effort to canvas all the available evidence? Have competing views been considered and, as needed, reconsidered? Were channels left open for the easy registration of dissent? Evaluation of the suitability of an information-gathering regime under uncertainty will focus on process in the same way.

In administrative law, this kind of interrogation of the reasoned quality of decision-making has since the 1970s been associated with “hard-look” judicial review or, more helpfully, process review, to distinguish it from judicial review of agency conformity to required procedures, or of the overall adequacy of some regulatory output.<sup>10</sup> As its name suggests, hard-look review requires an agency to assure that it has given searching consideration to relevant alternatives. From the first, this check on the conformity of the chain of administrative decision-making to a minimum standard of rationality has been understood to include the agency’s response to uncertainty. Perhaps the best statement of the requirements of process review, the D.C. Circuit’s 1974 opinion in *Industrial Union Department, AFL-CIO v. Hodgson*, held that when an administrator is “obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.”<sup>11</sup>

Courts are thus equipped to interrogate agency management of monitoring regimes. Indeed, many of the cases that courts hear in which first-order reasons are insufficient, leaving the agency to decide by coin toss or appeal to second-order reasons, arise from the failure of a poorly designed or carelessly operated information-gathering system, with the judge called on to evaluate the legal and practical merits of competing remedies. The question before the court (including in many of the cases Vermeule cites to illustrate his view of reason-giving under uncertainty) is not only what the agency should do given that it does not have the information needed to decide, but rather how it got into this situation in the first place, and what to do about *that*.<sup>12</sup> We are not suggesting that lawyers or courts, by asking such questions, should take the lead in designing the agency process of decision-making under uncertainty any more than they currently do. Our point is only that there is nothing alien to the legal mind in judging the sufficiency of an agency process against criteria no more or less vague than those used to evaluate the adequacy of administrative decision-making under more familiar conditions.

As public and private administrators come to appreciate that they are working under conditions of real uncertainty, they will seek whenever possible to make provisional decisions, learn quickly from them, and revise accordingly. They will use guidance, a form of administrative action defined by its provisionality. Guidance is an extraordinarily heterogeneous category, comprising all those written documents that administrators issue to inform their own staff and the public at large about how they currently understand and intend to enforce their legal authorities, whether derived from congressional statute or prior administrative regulation. As Parrillo notes, guidance comes in countless forms – “advisories, circulars, bulletins, memos, interpretive letters, enforcement manuals, fact sheets, FAQs, highlights, you name it” – and is nowhere systematically collected. As a rough estimate, the number of pages of guidance that agencies produce “dwarf[s] that of actual regulations by a factor of twenty, forty, or even two hundred.”<sup>13</sup>

Formally, the signal feature of guidance is its provisionality. Agency rules are generally issued and amended by means of a costly and time-consuming process, called “notice-and-comment” or “legislative” rulemaking, in which the agency must elaborately explain its purposes, expose its evidence-gathering and deliberation to public scrutiny, and explain its reactions to criticism. Guidance, in contrast, can be issued and amended quickly, with little if any formal process.<sup>14</sup> Because of this informality, guidance lacks “the force of law” and thus “the power to bind” private parties characteristic of agency rules. Guidance is, formally, “only a suggestion – a mere tentative announcement of the agency’s current thinking about what to do in individual adjudicatory or enforcement proceedings, not something the agency will follow in an automatic, ironclad manner as it would a legislative rule.”<sup>15</sup> As such, guidance not only permits but demands flexibility: “If a particular individual or firm wants to do something (or wants the agency to do something) that is different than what the guidance suggests, the agency is supposed to give fair consideration to that alternative approach.”<sup>16</sup> Similarly, while an agency may choose to depart from its guidance without formal process, it should in principle give a reasoned explanation for such departures.<sup>17</sup> Understood in this way, guidance is a tool for measured action.

Yet government-by-guidance has provoked significant legal controversy, for at least three related reasons.<sup>18</sup> First, as notice-and-comment rulemaking became accepted as the paradigmatic mode of administrative rulemaking, the less procedurally onerous issuance of guidance began to strike some scholars, litigants, and judges as a potential cheat. As Justice Elena Kagan put it during an oral argument in 2015, this is the recurrent concern that “agencies more and more are using interpretive rules and are using guidance documents to make law and that . . . it is essentially an end run around the notice and comment provisions.”<sup>19</sup> A second, related fear is that because the provisionality of guidance documents makes

them difficult to challenge in court, agencies can use guidance to evade not only the pre-issuance notice-and-comment process but also post-issuance judicial review as well.<sup>20</sup> A final concern relates to the proliferation of doctrinal deference to agencies' interpretation of their statutory mandates and prior regulations. Critics warn that such deference perversely shelters agency interpretations announced in guidance documents from judicial scrutiny, even though they do not reflect the deliberation and evidence-gathering required by the notice-and-comment process or by formal agency adjudication.<sup>21</sup>

Underlying these technical legal objections are deeper normative concerns about the relationship of regulation as "current thinking" to conventional forms of legal authority – legislative, executive, and judicial – that help to explain why guidance continues to bedevil American courts and legal commentators. Guidance, unlike notice-and-comment rules, cannot be seen as analogous to and directly descended from legislation as a natural outgrowth of the constitutional order. But neither does guidance have the finality that marks the culmination of lawful executive or judicial action. Unlike prosecutorial indictments and administrative enforcement actions, it does not purport to represent the executive branch's determination that a particular private party has violated the law; unlike administrative orders and judicial decisions, it is not an assessment of the guilt or liability of an accused party. Guidance is always ripening into a conclusive decision, but it is never ripe; for this reason, unlike administrative rules and orders, it is not reviewable by the courts as a matter of course.

In the paradigmatic forms of legal decision, the ultimate decision-maker is the agent of a constitutional principal – the legislature, the executive, the judiciary – or one of the constitutional principals themselves. Each of the latter is in turn ultimately the agent of the popular sovereign. In general, a principal sets the framework within which decisions are made and reviews an agent's actions for conformity to its intent. With guidance, and under uncertainty generally, this principal-agent relation breaks down. The framework for decision-making becomes indistinct as the field of possible actions and the criteria for evaluating them become less and less determinate, especially as seen, by the principal, from afar. The diligent administrative "agent," in dialogue with external actors (regulated parties and regulatory beneficiaries) as much as or more than with internal superiors, is as likely to make decisions presuming new frameworks as to apply old ones. Accordingly, the same circumstances that make guidance inherently provisional make it inherently refractory to the forms of control that traditionally confer legal validity and democratic legitimacy. To the extent that guidance regimes increasingly reflect ongoing collaboration among a hierarchically diverse group of public and private actors, the content and legal effect of guidance at any given moment will have an increasingly attenuated (or at least increasingly uncertain) relationship to legislative mandates, presidential directives, or judicial orders. However

scholastic or opportunistic debates about the legality and legitimacy of guidance can be, they articulate a very real problem: whether liberal democratic societies are capable of managing uncertainty without reinterpreting what it means to make law, and the values that underpin lawmaking, when law itself must often be provisional.

Well-established groups of practitioners in and around the agencies, anticipating our own approach, have over the years proposed working solutions to this problem, devising new standards by which guidance regimes can be developed with principled flexibility in mind, while remaining legible to courts and the public at large. The practitioners' understandings are reflected in a variety of "institutional pronouncements" – by the American Bar Association, the Administrative Conference of the United States, and guidance about guidance produced by the agencies themselves – which describe the sorts of reasons that agencies should be prepared to give to regulated parties, regulatory beneficiaries, and the courts whenever they depart from or adhere to a practice or norm established by prior guidance documents.<sup>22</sup> Like the commentators who refer approvingly to their views, the practitioners have no broad program of reform. But it is worth noting that, since the 1990s, successive cohorts have been at the forefront of such standard-setting, not resistant to it – as conservative fears about the widespread abuse of guidance might lead one to conclude.

Many liberal and left-leaning scholars, meanwhile, are so intent on defending the administrative state – conceived along midcentury lines – from conservative rollback that they are insufficiently attentive to the accumulating innovations in practice that might provide resources for responding to real deficiencies in the legality and legitimacy of administrative decision-making. Preoccupied with preservation, the progressive defense of the administrative state has given rise to an organizational and doctrinal synthesis of the governance mechanisms – agency expertise, presidential oversight, judicial deference – that, taken together, arguably legitimate in a novel and compelling way the traditional, and implicitly unchanging, forms of administrative governance. Below, we present this interpretation of administrative law and indicate its shortcomings as a framework for measured action under uncertainty.

**T**he *progressive synthesis* is our name for a constellation of arguments that ground administrative legality and legitimacy in external political control – presidential control in particular – and internal professionalism. This synthesis is the product of historical evolution, in which elements with different origins co-evolve, in the manner of the components of what would become the human eye, as they are enlisted into the service of a common function. Like all evolutionary stories, it has a "just so" aspect. We present it as a fully integrated whole to highlight its basic institutional and doctrinal commitments.<sup>23</sup>

Here, in outline, are the essentials: Externally, or at the outer boundary of the administrative state, Congress delegates authority to administrative agencies and the president directs how agencies wield it. Internally, this authority triggers processes of deliberation and decision conforming to the professional habits and norms of the scientific and legal experts who work within individual administrative agencies and supervisory institutions, such as the Office of Management and Budget (OMB). Thanks to this layer of professional mediation, the ultimate expression of congressionally delegated and presidentially directed authority – administrative decisions – can be expected, most of the time, to be both scientifically rational and legally valid. Energetic and continuing presidential direction, meanwhile, ensures that administration is not frustrated by the bureaucratic torpor and rivalry common to large organizations, and that decisions have the necessary democratic pedigree, even when they are far removed, in time and effect, from what Congress might have contemplated when first delegating authority to a particular agency.<sup>24</sup>

The synthesis of presidentialism and professionalism is effected by and embodied in internal administrative law: a body of norms, growing out of the practice of administration itself, that harmonizes the demands of political will, legal regularity, and scientific rationality. In the progressive account, internal administrative law is hierarchical: within agencies, it subordinates lower-level decision-making to higher-level review, with the head of the agency as the ultimate authority; within the executive branch, it subordinates agencies to the direction of the president. Institutionally, the routine operation of these nested hierarchies is policed by super- or meta-agencies – such as the OMB and, within it, the Office of Information and Regulatory Affairs – housed within the Executive Office of the President.<sup>25</sup>

Because presidentialism and professionalism continually imbue administrative decisions with democratic legitimacy, legal validity, and scientific rationality, courts lose their centrality as the guardians of the constitutional conformity of the administrative state. Partisans of the progressive synthesis rarely disclaim the virtues of judicial review altogether, but they focus on its vices: the tendency of courts to subordinate the rationality of the administrative process to their own professional and political preferences. These limits warrant a general policy of judicial deference to administrative decision-making. More often than not, courts should avoid reviewing administrative decisions at all; when review is called for, courts should defer to administrators' expert views of the meaning of the laws their decisions implement, the procedures that were necessary to get the job done, and the evidentiary and policy rationales for deciding one way or another.

Whatever its merits as a response to anti-administrative attacks, the progressive synthesis is deficient in important ways. First, it is conceptually incomplete, if not incoherent. As has been manifest since the New Deal, decision-making by po-



litical directive and decision-making by expertise proceed by different methods. They may reach the same or compatible solutions, but they may not. The synthesis provides no process or principles for systematically reconciling them. Instead, following the promptings of doctrine, it assumes that both can be exchanged into the common currency of hierarchy and made interchangeable. But as the countless conflicts between the previous administration and the professional staffs of the agencies attest, the reality is otherwise. In fact, courts are routinely called on to decide whether, in a particular case, deference is owed to hierarchical authority of one kind or another, political or professional. Familiar tensions are recast, not overcome.<sup>26</sup>

These tensions point to a second and politically salient defect of the synthesis: its limited resources for responding to presidential overreach. For the progressive synthesis, the chief threat to constitutional democracy continues to be, as it has been since the New Deal, a conservative judiciary and, more generally, the frustration of decisive and synoptic leadership, whatever its origin. Expansive defense of doctrines of judicial deference to administrative hierarchy responds to the first danger, while defense of the authority of the Executive Office of the President to supervise, coordinate, and direct decision-making across the administrative state responds to the second. But when the corrective of an empowered White House itself becomes a threat – perhaps *the* threat – to democratic, lawful, and effective administration, these responses become worse than useless.

A third deficiency goes to the inadequacy of the progressive synthesis as a response to uncertainty. The synthesis validates authority in its various forms while seeking to coordinate their exercise. Uncertainty calls authority in all its forms into question. It does not, to be sure, simply devalue expertise or political leadership. But it emphasizes the role of the expert and the political leader as organizers of open-ended inquiry, rather than as repositories of tried-and-true solutions that must merely be adapted to new contexts.

**I**f not by the progressive synthesis, how then can administrative law help make professional expertise and political control usefully commensurate, in ways that improve the capacity of the administrative state to respond to uncertainty, conform it to minimal liberal democratic norms, and limit the dangers of presidential overreach? We offer a provisional answer to this question in the form of an alternative doctrinal program and a reminder of the fundamental need for organizational reform.

Our programmatic alternative treats uncertainty not simply as a challenge to be met, but as a guide. Uncertainty is the great leveler. In revealing the limits of current knowledge, it limits the claims of authority – all forms of secular authority at least – and presses authorities of all sorts into a more or less open inquiry that continually updates the nature of a given problem and its provisional solutions.

Such inquiry, moreover, regularly brings to light the interdependence of disparate types of authority, as political action is found to have technical prerequisites and vice versa. Forms of administrative law and organization that improve the quality of reason-giving and exchange between the political and technical authorities, and enable courts and the public to better judge these authorities' respective claims, make the administrative state more effective in responding to uncertainty and more likely to respect core liberal democratic norms in doing so.

The alternative program emphasizes that judicial review, despite its susceptibility to ideological capture and prolonged history of anti-administrativism, remains an indispensable tool for resolving conflicts between presidentialism and professionalism, sociopolitical and sociotechnical reason-giving.<sup>27</sup> Current doctrine invites litigants and judges to attack guidance as practically binding regulations that should have gone through the notice-and-comment process. We agree with the progressive view that this doctrine should be reformed, not least to avoid formalistic maneuvering on all sides that leaves administrative action less susceptible to post-issuance input, learning, and revision on the fly. But we part company with the progressive synthesis when it comes to the availability and scope of judicial review of guidance.

The traditional argument against the reviewability of guidance begins in prudence but ends in formalism: guidance is said to lack the finality and ripeness necessary for effective and lawful judicial review under the Administrative Procedure Act (APA), the Constitution, and the common law. The objection to this argument is that guidance is so well-suited to regulating in an uncertain world precisely because it encourages participants in the administrative process *to act now*: to experiment with new technologies and methods of organization, to share information, and to give reasons why other participants should act differently in light of these experiments and information exchanges. If a proposed guidance regime is legally or practically flawed, and that flaw is presently known, it should be presently addressed. Otherwise, the resulting regime risks discouraging the exploration and experimentation it is meant to foster.<sup>28</sup>

With respect to the scope of judicial review, the progressive synthesis endorses and would extend a body of doctrine that focuses on whether guidance documents are permissible interpretations of preexisting statutory and regulatory provisions. Instead of asking how well-considered, responsive to objections, and consistent with prior explanations agency reason-giving is, these doctrines encourage judges to determine only whether administrators are offering minimally reasonable interpretations of the statutory and regulatory provisions that authorize them to regulate at all.<sup>29</sup> In recent years, progressives have argued that this type of reasonable-interpretation inquiry should, in most circumstances, be as narrow and formalistic as possible; a semantically plausible interpretation – an excuse that can be understood as excusing – is good enough. This formalism may

well limit the extent to which judges interpose their own views for those of administrators, but it does so at the price of obscuring and thus tolerating or even encouraging incompetent or self-serving decision-making.

Our alternative program would refocus courts and agencies on what some commentators have called *process review*: review of the chain of reasoning that has led an agency to adopt and maintain a particular guidance regime.<sup>30</sup> Such review asks whether the agency's decisions in the form of guidance are well-considered, responsive to objections, and consistent with prior explanations of agency behavior and previously established regulatory presumptions. When an agency departs from prior explanations or presumptions, or chooses to maintain them despite objections, process review asks whether the agency has acknowledged its departures (or refusals to change course) and whether it has given plausible reasons for its choices. So described, process review is distinct both from procedural review, which asks whether a guidance document is so impactful that it should have been issued by more onerous procedures (such as notice-and-comment rulemaking), and from outcome review, which asks whether a guidance document is substantively reasonable in light of the evidence the agency had at its disposal. The deferential review of an agency's interpretive choices preferred by progressives is one kind of outcome review, while the suspicion that agencies use guidance to avoid notice-and-comment rulemaking frequently leads conservatives and more classical liberals to advocate an exacting kind of procedural review.<sup>31</sup> Process review steers clear of these extremes and, more importantly, encourages agencies to acknowledge uncertainty and manage it in a reasonable manner.<sup>32</sup>

Happily, there are resources in current law that permit judicial review of agency action under uncertainty to take the form of process review and, in doing so, improve the quality of administrative reason-giving. One such resource is hard-look arbitrary and capricious review, the standard that judges apply when reviewing an agency's exercise of its policy judgment rather than its interpretive acumen. While hard-look review can resemble either process or outcome review, depending on the kinds of questions that a court asks when assessing an agency's policy judgment, the canonical hard-look case, *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance* (1983), nicely exemplifies the sort of process inquiry we favor.

Another doctrinal resource that already encourages process review is the *Skidmore* framework.<sup>33</sup> *Skidmore* instructs judges to give weight to an agency's legal interpretation according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."<sup>34</sup> Subsequent doctrinal developments significantly narrowed the reach of *Skidmore* in favor of more hierarchically minded, formalistic, and deferential standards, such as *Chevron* (which directs judges to accept facially reasonable interpretations of an agency's ambig-

uous statutory mandates) and *Auer* (which directs judges to accept facially reasonable interpretations of an agency's own ambiguous regulations). These latter standards are today most vociferously defended by progressives. Recently, however, judges and scholars from across the political spectrum have begun to explore the possibilities of *Skidmore* anew.<sup>35</sup>

In the 2018 *Kisor* decision, Justice Elena Kagan, whose defense of Clintonian presidential administration has become a keystone of progressive thinking, wrote an opinion narrowing the scope of *Auer* deference, much to the disappointment of progressive scholars. Kagan's opinion directed lower court judges to ask a set of threshold questions before applying *Auer* when reviewing agency interpretations of their prior regulations. These threshold questions, somewhat analogous to ones that already confine the application of *Chevron* in statutory interpretation, effectively move away from the formalism of *Auer* and back toward the more holistic *Skidmore* endeavor of calibrating the degree of deference to the persuasive quality of agency decision-making.

Our alternative program would accelerate this movement, urging, for example, that guidance documents always be evaluated under *Skidmore*, whether they are construed as interpreting an agency's prior regulations or its statutory mandates. Going further, the alternative program would extend *Skidmore* to notice-and-comment rules, displacing the *Chevron* framework altogether and thus limiting agency incentives to regulate in a more inflexible manner when guidance would do.

Of course, the pursuit of *Chevron* deference is not the primary reason that agencies regulate by notice-and-comment rulemaking. Statutory requirements and judicial expectations, as well as genuine desire for public input, all drive agencies toward the notice-and-comment process, at least some of the time. To the extent that many so-called statutory requirements are themselves products of judicial interpretation (whether of the APA, an agency's organic statute, or both), this is another area where our alternative program would recommend greater, rather than less, judicial deference. Unless an agency's organic statute explicitly requires notice-and-comment rulemaking, judges should permit the agency to proceed by guidance.<sup>36</sup>

Finally, the alternative program would recommend that hard-look review and the *Skidmore* inquiry, both understood as process rather than outcome tests, be used more or less interchangeably. In this way, judicial review of the agency's reasoning process would converge on a single standard in nearly all cases, mitigating the incentives agencies have to choose one form of rulemaking (more rather than less formal) or reason-giving (interpretive rather than policy-based) over another in order to garner greater judicial deference.<sup>37</sup>

Together these recommendations recast judicial review, at least with respect to guidance and thus action under uncertainty, as asking not whether agency decisions possess a sufficiently hierarchical pedigree to merit deference, but whether they give reasoned explanations for action (or inaction).

Our alternative program is not, however, simply a call to recenter the courts. We recognize that internal administrative law and organizational reform are vital complements to process review as a means of improving agency reason-giving. The progressive synthesis, however, is drawn to a peculiarly hierarchical conception of internal administrative law. By embedding administration in hierarchy, the synthesis seeks to reconcile presidentialism and professionalism and, in doing so, justify a more limited role for the courts. But under uncertainty, this approach imputes a burden of certitude on technical and political authorities that neither can bear.

Administrative law scholar Jerry Mashaw's historical reconstruction of internal administrative law, informed and in some measure inspired by his investigations of decision-making in federal agencies around 1980, suggests an alternative interpretation, one that is less hierarchical and more capable of managing uncertainty.<sup>38</sup> Mashaw understands internal administrative law as a system of quality control by which an agency corrects flaws in its process of decision-making to better serve its public purpose, where that purpose notably requires the process itself to be perceived as fair. Internal administrative law as quality control is always relative to the kind of decisions whose quality is in question. When, as was the case when Mashaw did his empirical research, the public interest was served by the hierarchical application of fixed rules to decide the validity of individual claims, internal administrative law aimed to improve the quality of the information available to the hierarchy and the reliability of its treatment of that information. But when, as is increasingly the case, the public interest under uncertainty is served by full and fair ventilation of reasons for action in changing contexts that resist hierarchical control, internal administrative law turns to improving the quality of *those* processes. Thus, one of the most thorough recent case studies of internal administrative law documents such a shift, showing how the Environmental Protection Agency replaced an unworkable standard-setting procedure – which advanced from regulatory goal-setting to the choice of regulatory means in the familiar hierarchical or principal-agent sequence – with a nonhierarchical process that invites criticism of emergent decisions at each stage of their development.<sup>39</sup>

Enlarged to include, as it plainly does, nonhierarchical routines, internal administrative law can indeed be an instrument for harmonizing different forms of expertise. But like judicial review of process, it does so by requiring the clarification of differences, not by assuming that different ways of knowing and deciding can be ranked according to the degree they are authoritative.

Both process review and internal administrative law, properly understood, can improve the incentives for sound reason-giving. But neither separately nor together can they substitute for the demanding organizational reform of agencies needed to make principled flexibility a practical routine. For Parrillo, this rewiring of the circuits of decision-making is paramount: “Mitigating the binding power of

guidance documents entails interventions that are essentially structural and managerial.”<sup>40</sup> His research reminds us again and again of the betwixt-and-between character of our agencies, with front-line departments rigidly enforcing rules and a separate, superior department making and revising them, even as questions of private-sector “compliance” increasingly implicate questions about the advisability of rule changes. Often, we expect, reorganization aimed at overcoming these barriers to the fluid internal collaboration required for principled flexibility will trigger corresponding changes in internal administrative law; sometimes revisions of internal law will trigger further institutional reform. In either case, change requires both reformed practices and new legal norms validating them.

In the end, going beyond the progressive synthesis means allowing administrative innovation in the face of uncertainty to run its course. Like the progressive defense of the administrative state, our alternative program depends on administrators acting in good faith, most of the time. But the alternative program breaks with the progressives’ reliance on the formalism of principal-agent relationships and hierarchically ordered authorities to legitimate administrative action.<sup>41</sup> That reliance is out of character, given progressivism’s origins in a revolt against formalism. But above all, it is self-defeating. Against the conservatives’ formalistic objections to administrative governance, progressives have taken refuge in a formalism of their own, one that fetters administration with an outmoded model of decision-making too self-confident for an uncertain world.

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**Jeremy Kessler** is Professor of Law at Columbia University. His forthcoming book is *Fortress of Liberty: Conscription and Constitutional Change in Twentieth-Century America*.

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#### ENDNOTES

<sup>1</sup> For an influential study in this genre that links the failure of traditional forms of product development and marketing, and the need for alternative approaches, to the rise of uncertainty, see Clayton M. Christensen, *The Innovator’s Dilemma* (New York: Harper Business, 2013).

<sup>2</sup> Adrian Vermeule, *Law’s Abnegation: From the Law’s Empire to the Administrative State* (Cambridge, Mass.: Harvard University Press, 2016), 125–154.



- <sup>3</sup> Nicholas R. Parrillo, “Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries,” *Yale Journal on Regulation* 36 (1) (2019): 165.
- <sup>4</sup> Nicholas Parrillo, *Federal Agency Guidance: An Institutional Perspective* (Washington, D.C.: Administrative Conference of the United States, 2017).
- <sup>5</sup> Under stable conditions, cooperation is typically impeded by an information asymmetry: because the regulator is less knowledgeable about risks and the costs of abating them than the regulated entity, the latter has an incentive to conceal information in order to reduce the eventual costs of compliance. Under uncertainty, ignorance is symmetric.
- <sup>6</sup> Michel Callon, Pierre Lascoumes, and Yannick Barthe, *Acting in an Uncertain World: An Essay on Technical Democracy* (Cambridge, Mass.: The MIT Press, 2009).
- <sup>7</sup> On such regimes generally, see Charles F. Sabel and William H. Simon, “Minimalism and Experimentalism in the Administrative State,” *The Georgetown Law Journal* 100 (2011): 53.
- <sup>8</sup> See, for example, Michelle Ouellette and Charles Landry, “The Western Riverside County Multiple Species Habitat Conservation Plan: Looking Forward After Ten Years,” *Natural Resources and Environment* 29 (3) (2014): 40; and Robert Ball, Melissa Robb, Steven A. Anderson, and G. Dal Pan, “The FDA’s Sentinel Initiative – A Comprehensive Approach to Medical Product Surveillance,” *Clinical Pharmacology & Therapeutics* 99 (3) (2016): 265–268. See the detailed explanation of the process by which the Environmental Protection Agency periodically resets the Nation Ambient Air Quality Standards in Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, “The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy,” *Wake Forest Law Review* 47 (2012): 463.
- <sup>9</sup> J. B. Ruhl, “Regulation by Adaptive Management – Is It Possible?” *The Minnesota Journal of Law, Science & Technology* 7 (1) (2005): 21. In a subsequent article, Ruhl and Robin Craig argue that the continuing adjustments of policy required for ecosystem governance fit awkwardly within the procedures of conventional administrative law, and that judicial oversight of such regimes would be better exercised by creating a procedural “track” that takes account of their distinct features. See Robin Kundis Craig and J. B. Ruhl, “Designing Administrative Law for Adaptive Management,” *Vanderbilt Law Review* 67 (1) (2014): 1. Daniel Tarullo argues on the same grounds for a “more tailored” application of administrative law regarding bank supervision. Daniel K. Tarullo, “Bank Supervision and Administrative Law,” paper presented to the Yale Journal on Regulation 2019 Administrative Law Conference, Washington, D.C., 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3743404](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743404). The accumulation of such weighty exceptions with common features points to the opportunity for a new rule.
- <sup>10</sup> For a discussion of the distinguishing features of process review and its relation to the hard-look doctrine, see Gary Lawson, “Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions,” *Rutgers Law Review* 48 (2) (1996): 313, 318.
- <sup>11</sup> Cited in *ibid.*, 324.
- <sup>12</sup> *Tucson Herpetological Society v. Salazar*, 566 F.3d 870, 874–875 (9th Cir.); *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1019–1021 (9th Cir. 2011); *Sierra Club v. Environmental Protection Agency*, 873 F.3d 946, 951–952 (D.C. Cir. 2017); and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333–334, 109 S. Ct. 1835, 1837–1838, 104 L. Ed. 2d 351 (1989).
- <sup>13</sup> Parrillo, “Federal Agency Guidance and the Power to Bind,” 167–168.
- <sup>14</sup> See Mark Seidenfeld, “Substituting Substantive for Procedural Review of Guidance Documents,” *Texas Law Review* 90 (2011): 331, 340–341.

- <sup>15</sup> Parrillo, “Federal Agency Guidance and the Power to Bind,” 168–169.
- <sup>16</sup> *Ibid.*, 169.
- <sup>17</sup> See, for example, ABA Recommendation 120C, 118-2, *A.B.A. Annual Report* 57 (1993).
- <sup>18</sup> For a useful overview, see Peter Strauss, “Domesticating Guidance,” *Environmental Law* 49 (3) (2019): 765.
- <sup>19</sup> *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052), Oral Argument at 11:27, <https://perma.cc/D6E2-7HLV>.
- <sup>20</sup> See, generally, Steven J. Lindsay, “Timing Judicial Review of Agency Interpretations in *Chevron’s* Shadow,” *The Yale Law Journal* 127 (8) (2018): 2448.
- <sup>21</sup> See, generally, Christopher J. Walker, “Attacking *Auer* and *Chevron* Deference: A Literature Review,” *Georgetown Journal of Law & Public Policy* 16 (1) (2018): 103.
- <sup>22</sup> For discussion of these institutional pronouncements, see Ronald M. Levin, “Rulemaking and the Guidance Exemption,” *Administrative Law Review* 70 (2) (2018): 263, 278–287.
- <sup>23</sup> Exemplary works include: Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, Conn.: Yale University Press, 2012); Blake Emerson, *The Public’s Law: Origins and Architecture of Progressive Democracy* (New York: Oxford University Press, 2019); Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); Nicholas Bagley, “The Procedure Fetish,” *Michigan Law Review* 118 (3) (2019): 345; Jeremy K. Kessler, “The Administrative Origins of Modern Civil Liberties Law,” *Columbia Law Review* 114 (2014): 1083; Kathryn E. Kovacs, “Progressive Textualism in Administrative Law,” *Michigan Law Review Online* 118 (2020): 134; Elizabeth Magill and Adrian Vermeule, “Allocating Power within Agencies,” *The Yale Law Journal* 120 (5) (2011): 1032; Gillian E. Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017): 1; Gillian E. Metzger and Kevin M. Stack, “Internal Administrative Law,” *Michigan Law Review* 115 (8) (2017): 1239; Jon D. Michaels, “Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers,” *New York University Law Review* 91 (2) (2016): 227; and Cass Sunstein and Adrian Vermeule, “Libertarian Administrative Law,” *The University of Chicago Law Review* 82 (1) (2015): 393.
- <sup>24</sup> Two other sources of legitimacy that sometimes have been invoked by progressive scholars are public participation in agency decision-making (paradigmatically, through notice-and-comment rulemaking) and transparency about such decision-making. See, for example, Maggie McKinley, “Petitioning and the Making of the Administrative State,” *The Yale Law Journal* 127 (2018): 1538, 1600–1605 (discussing progressive arguments for participatory administration); and David E. Pozen, “Transparency’s Ideological Drift,” *The Yale Law Journal* 128 (2018): 100, 107–123 (discussing progressive arguments for transparent administration). Yet the leading progressive defenses of the administrative state treat these potential sources of legitimacy as either derivative of or subordinate to presidentialism and professionalism. While public participation can supplement the democratic pedigree provided by presidentialism and improve the information that the professionals have at their disposal, the availability and quality of public participation is dependent on, and rightfully subject to revision by, professionals. Indeed, one of the functions of administrative legitimacy, from the progressive point of view, is to ensure this professional control of participation. It is professionals who should determine when participation is most necessary and appropriate, who

should channel that participation in effective ways, and who should ensure an equality of opportunity in participation, even going so far as to correct barriers to equal participation that stem from social and economic inequalities. A similar story can be told about transparency. Transparency requirements can help keep presidents and professionals in line, encouraging them to make decisions in a manner that will be broadly acceptable to the bar, the bench, the media, and the public at large. But the tendency of contemporary, progressive scholars is to second-guess transparency's benefits and to insist that the authority to weigh the costs and benefits of transparency be left, in most circumstances, to presidents and professionals. In general, the most passionate advocates of participation and transparency make proposals that are inconsistent with or antithetical to the visions of reform offered by the leading progressive defenders of the administrative state's legality and legitimacy. With respect to participation, see, for example, David J. Arkush, "Direct Republicanism in the Administrative Process," *The George Washington Law Review* 81 (2013): 1458; Jessica Mantel, "Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State," *Administrative Law Review* 61 (2009): 343; and Lisa Schultz Bressman, "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State," *New York University Law Review* 78 (2) (2003): 461. With respect to transparency, see Pozen, "Transparency's Ideological Drift," 123–146 (discussing "transparency's rightward drift").

<sup>25</sup> See Metzger, "1930s Redux," 1256.

<sup>26</sup> Some progressive scholars have recognized the utility of the courts in navigating these tensions. See, for example, Gillian E. Metzger, "Ordinary Administrative Law as Constitutional Common Law," *Columbia Law Review* 110 (2010): 479, 492. "Hard look review prioritizes expertise and technocratic decisionmaking within the agency, in the process downplaying more raw political considerations. At the same time, requiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing." As this description suggests, however, the ideal judicial intervention, from a progressive perspective, will maintain a balance of power between technical and political authorities, leaving the reconciliation of real differences to a process beyond the purview of the courts.

<sup>27</sup> For a related argument, see Daniel Farber and Anne Joseph O'Connell, "Agencies as Adversaries," *California Law Review* 105 (2017): 1375.

<sup>28</sup> For a related argument, see Seidenfeld, "Substituting Substantive for Procedural Review of Guidance Documents."

<sup>29</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (with respect to statutes); and *Auer v. Robbins*, 519 U.S. 452 (1997) (with respect to regulations).

<sup>30</sup> See Lawson, "Outcome, Procedure and Process," 323–324.

<sup>31</sup> Interpretive review counts as a form of outcome review because it asks whether the outcome of the agency's interpretation as expressed in a guidance document is substantively correct in light of the meaning of preexisting statute or regulation that is being interpreted. For further discussion, see *ibid.*, 325. Outcome review can be very deferential or very demanding, depending on the quality and quantity of evidence that courts demand.

<sup>32</sup> Our colleague Thomas Merrill has recently proposed a hybrid of outcome, process, and procedural review, which invites courts to defer to agency interpretations of prior stat-

utes and regulations when those interpretations are promulgated in a manner that resembles (but need not replicate precisely) the procedures used in notice-and-comment rulemaking. See Thomas W. Merrill, *To Say What the Law Is: The Supreme Court's Chevron Doctrine and the Future of the Administrative State* (forthcoming). While Merrill's proposal is very much in the same spirit as our own, we think it is both too demanding and too lax for an uncertain world: agencies should not have to use procedures that resemble notice-and-comment to merit judicial respect, nor should judges assume that the use of notice-and-comment-like procedures is an adequate proxy for reasoned decision-making.

<sup>33</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>34</sup> *Ibid.*, 140.

<sup>35</sup> See, for example, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); Blake Emerson, "The Claims of Official Reason," *The Yale Law Journal* 128 (8) (2019): 2122; Daniel A. Farber and Anne Joseph O'Connell, "The Lost World of Administrative Law," *Texas Law Review* 92 (2014): 1137, 1186; and Daniel E. Walters, "Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control," *Journal of Law and Politics* 28 (2013): 129, 175–178.

<sup>36</sup> We thank Gillian Metzger for pressing us on this point.

<sup>37</sup> For a related discussion of the virtues of a single standard of review, see David Zaring, "Rule by Reasonableness," *Administrative Law Review* 63 (2011): 575.

<sup>38</sup> Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, Conn.: Yale University Press, 1983), 161. For discussion, see Charles F. Sabel and William H. Simon, "The Management Side of Due Process in the Service-Based Welfare State," in *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw*, ed. Nicholas R. Parrillo (Cambridge: Cambridge University Press, 2017).

<sup>39</sup> See Shapiro et al., "The Enlightenment of Administrative Law"; and Lisa P. Jackson, "Process for Reviewing National Ambient Air Quality Standards," memorandum (Washington, D.C.: U.S. Environmental Protection Agency, 2009), <https://www3.epa.gov/ttn/naaqs/pdfs/NAAQSReviewProcessMemo52109.pdf>.

<sup>40</sup> Parrillo, "Federal Agency Guidance and the Power to Bind," 183.

<sup>41</sup> In this regard, our alternative program is consistent with Nicholas Bagley's recent critique of "the procedure fetish," although that critique styles itself as a defense of progressive administrative governance. See, generally, Bagley, "The Procedure Fetish."

# Some Costs & Benefits of Cost-Benefit Analysis

*Cass R. Sunstein*

*The American administrative state has become a cost-benefit state, at least in the sense that prevailing executive orders require agencies to proceed only if the benefits justify the costs. Some people celebrate this development; others abhor it. For defenders of the cost-benefit state, the antonym of their ideal is, alternately, regulation based on dogmas, intuitions, pure expressivism, political preferences, or interest-group power. Seen most sympathetically, the focus on costs and benefits is a neo-Benthamite effort to attend to the real-world consequences of regulations, and it casts a pragmatic, skeptical light on modern objections to the administrative state, invoking public-choice theory and the supposedly self-serving decisions of unelected bureaucrats. The focus on costs and benefits is also a valuable effort to go beyond coarse arguments, from both the right and the left, that tend to ask this unhelpful question: "Which side are you on?" In the future, however, there will be much better ways, which we might consider neo-Millian, to identify those consequences: 1) by relying less on speculative ex ante projections and more on actual evaluations; 2) by focusing directly on welfare and not relying on imperfect proxies; and 3) by attending closely to distributional considerations – on who is helped and who is hurt.*

From 1981 to the present, the American administrative state has become, to a significant extent, a cost-benefit state.<sup>1</sup> Under prevailing executive orders, agencies must calculate the costs and benefits of proposed and final regulations, and to the extent permitted by law, may proceed only if the benefits justify the costs. These requirements have spurred, and helped make possible, life-saving regulations in a variety of domains, including clean air, motor vehicle safety, clean water, homeland security, public health, climate change, and occupational safety. At the same time, they have served as a check on, and an obstacle to, regulations that would cost a great deal and achieve very little.

Of course it is true that political considerations matter, even in a cost-benefit state. In Congress, cost-benefit analysis often takes a back seat, if it makes it into the room at all. In the executive branch, political convictions, dogmas, or perceived electoral considerations may trump the outcome of cost-benefit analysis, or make it an ex post justification or an afterthought, rather than a driver of deci-

sions. Nonetheless, the analysis of costs and benefits, offered by technical specialists, often has a real impact on regulatory choices, pressing administrators in the direction of greater or less stringency, exposing new options, or offering a bright green GO! or a forbidding red STOP!

In terms of rigor, coverage, and accuracy, a great deal remains to be done. The fact that cost-benefit requirements do not apply to the “independent” agencies, such as the Federal Communications Commission, the Securities and Exchange Commission, and the Nuclear Regulatory Commission, is a continuing problem. Sometimes the numbers are based on guesswork, and there is continuing concern about whether before-the-fact estimates (of, for example, safety and health regulations) are reliable, or whether they are, on some occasions, a stab in the dark. Many people have argued for rigorous, ongoing evaluations, in which administrators test whether (for example) a regulation designed to increase food safety, or to protect against occupational injuries, is actually having its intended effect, and whether it is doing better or worse than expected. They are right to make that argument.

Despite the continuing challenges, the emergence of the cost-benefit state is a remarkable achievement. It means that the role of dogmas, intuitions, and interest groups has diminished and that within the executive branch, at least, regulators have often focused insistently on the human consequences of what they are proposing to do. To a significant extent, the cost-benefit state has been a check on “expressivism,” in which public officials, on either the left or the right, act to express abstract values without exploring whether particular initiatives would actually have good or bad consequences. To the extent that the consequences of regulations are genuinely good (because, say, they prevent hundreds or thousands of deaths), the rise of the cost-benefit state casts a new light on some prominent and high-minded critiques of modern administration – for example, that it is a product of unelected bureaucrats, a tribute to the power of well-organized private groups, a reflection of monied interests, an unacceptable abdication of legislative authority, or a product of government’s efforts to expand its own power.

To be sure, each of these critiques must be met on its own terms. But if (for example) a motor vehicle safety regulation from the Department of Transportation, authorized by Congress, is preventing three hundred deaths annually and costing just \$40 million, it would not seem that there is good reason for complaint, and the same is true if the Environmental Protection Agency (EPA) is finding ways to reduce greenhouse gases significantly and at modest cost. Indeed, many regulations, under both Republican and Democratic administrations, have delivered massive net benefits (understood as benefits minus costs). It is not unusual to find that in a given year, the monetized benefits of regulations (including the benefits in terms of preventing illnesses, accidents, and premature deaths) exceed the monetized costs *by many billions of dollars*. (The Trump administration was an



outlier; because it issued so few regulations, the annual costs of what it did were very low, and so were the annual benefits.)

Under favorable conditions, the use of cost-benefit analysis can provide safeguards against decisions based on feelings, hopes, presumptions, perceived political pressures, appealing but evidence-free compromises, broad aspirations, guesses, or the wishes of the strongest people in the room. But the administrative state should do better still. It needs to focus directly on human welfare. It should see cost-benefit analysis as a mere proxy for welfare, and an imperfect one to boot. It needs to investigate welfare itself, and to explore what that idea is best understood to mean. It needs as well to focus on distributional considerations – on who is helped and who is hurt.

To see the underlying problems, consider a realistic if highly stylized example. Suppose that the Environmental Protection Agency is considering a new regulation designed to reduce levels of particulate matter in the ambient air. Suppose that the total annual cost of the regulation would be \$900 million. Suppose that the monetized mortality benefits would be higher than that – because, say, the regulation would prevent one hundred deaths, each valued at \$10 million. (This is a hypothetical number; as of 2021, prominent federal agencies valued a statistical life at about \$11 million.) Suppose as well that if the EPA includes morbidity benefits (in the form of nonfatal illnesses averted), the regulation would produce an additional \$350 million in benefits, meaning that the monetized benefits (\$1.35 billion) are significantly higher than the monetized costs (\$900 million). At first glance, the cost-benefit analysis suggests that the regulation is an excellent idea, and that the EPA should go forward with it.

Now assume four additional facts. First, the mortality benefits of the regulation would be enjoyed mostly by older people: those over the age of eighty. Second, the rule would have significant disemployment effects, imposing a statistical risk of job loss on a large number of people, and ultimately causing three thousand people to lose their jobs. Third, the EPA believes that the overwhelming majority of those three thousand people would find other jobs, and probably do so relatively soon, but it does not have a great deal of data on that question and it cannot rule out the possibility of long-term job loss for many people. Fourth, the mortality and morbidity benefits would be enjoyed disproportionately by low-income communities and by people of color. In accordance with standard practice, the EPA does not include any of those further facts in its cost-benefit analysis.

If the goal is to promote social welfare, it would be far too simple for the EPA to conclude that, because the monetized benefits exceed the monetized costs, it should proceed with the regulation. One question is whether and how to take into account, in *welfare* terms, the relatively few additional life-years that the regulation will generate. In those terms, is a rule that “saves” people over eighty to be deemed equivalent to one that “saves” an equivalent number of people who are

(say) under thirty? And what are the welfare consequences of the \$900 million expenditure? Suppose that, concretely, the admittedly high cost will be spread across at least two hundred million people, who will be spending, on average, a little over \$4 annually for the regulation. What are the welfare consequences of that modest expenditure? Might they be relatively small? (The answer is emphatically *yes*. Most people will lose essentially no welfare from an annual \$4 loss.)

A further question is the disemployment effect. We know that in terms of subjective welfare, it is extremely bad to lose one's job.<sup>2</sup> People who lose their jobs suffer a lot: Job loss can severely harm one's self-worth and experience of daily life. A sudden loss of income can threaten housing and food security, often causing disruptions to family life and schooling. A loss of a job also creates a nontrivial long-term loss in income.<sup>3</sup> If you are out of work for a year, the economic toll might be very high over a lifetime. We know that a long-term loss of employment has more severe adverse consequences than a short-term loss, but both are bad. Shouldn't those welfare effects be included?

Yet another question is the distributional impact. If the health benefits of regulation would be enjoyed mostly by members of low-income groups, and particularly by people of color, might that matter? We might think that even if the rule does not have significant net welfare benefits, or even if it has some net welfare costs, it is nonetheless desirable, if and because it increases equality. The interest in environmental justice focuses on the very real possibility that wealthy people might be the disproportionate beneficiaries of polluting activity and that poor people might bear most of the costs. (In the context of air pollution, that appears to be true.)

These considerations suggest that while monetized costs and benefits tell us a great deal, they do not tell us everything that we need to know. On welfare grounds, a rule might not make sense even if the monetized benefits are higher than the monetized costs, and a rule might make sense even if the monetized costs are higher than the monetized benefits. In addition, we should want to consider distributional effects. To be sure, a rule that costs \$1 billion and that provides benefits of \$100 would not be a good idea even if the wealthy pay that \$1 billion and poor people receive that \$100. But if a rule costs \$1 billion and delivers \$950 million in benefits, we might want to go forward with it if the cost is diffused among a large number of wealthy people, and if the benefit is enjoyed by (for example) coal miners whose lives are at stake.

Now suppose that the Department of Transportation is considering a regulation that would require all new automobiles to come equipped with cameras, so as to improve rear visibility and thus reduce the risk of backover crashes.<sup>4</sup> Suppose that the total estimated annual cost of the regulation is \$1.2 billion (reflecting an average added cost of \$300 per vehicle sold over the relevant time period). Suppose that the regulation is expected to prevent sixty deaths annually, for mone-

tized annual savings of \$540 million, as well as a number of nonfatal injuries and cases of property damage, for additional annual savings of \$200 million. On the basis of these numbers, the Department is inclined to believe that the benefits of the rules are significantly lower than the costs.

At the same time, suppose that the Department is aware of four facts that it deems relevant, but that it is not at all sure how to handle. First, a majority of the deaths that the regulation would prevent would involve young children, between the ages of one and five. Second, a majority of those deaths would occur as a result of the driving errors of their own parents, who would therefore suffer unspeakable anguish. Third, the cost of the rule would be diffused across a large population of new car purchasers, who would not much notice the per-vehicle cost. Fourth, the cameras would improve people's driving experience by making it much easier for them to navigate the roads, even when it does not prevent crashes. (The Department speculates that many consumers do not sufficiently appreciate this improvement when deciding which cars to buy.) Is it so clear, in light of these four facts, that the agency should not proceed? That is not a hard question. The answer is: *no*. That answer suggests the importance of considering variables that are difficult or perhaps impossible to quantify. (How exactly to do that is a hard question.)

In principle, cost-benefit analysis is best defended as the most administrable way of capturing the welfare effects of policies (including regulations). But if we actually *knew* those effects, in terms of people's actual welfare (suitably specified), and thus could specify the actual consequences of policies for welfare (again, suitably specified), we would not have to trouble ourselves with cost-benefit analysis. An initial problem is that cost-benefit analysis depends on willingness to pay, and people might be willing to pay for goods that do not have substantial positive effects on their welfare (and might be unwilling to pay for goods that would have substantial positive effects). Willingness to pay is based on a prediction, and at least some of the time, people make mistakes in forecasting how various outcomes will affect their lives (and make them feel). Call them *welfare forecasting errors*. You might think that if you do not get a particular job, or if your favorite sport team loses a crucial game, or even if someone you really like refuses to date you, you will be miserable for a good long time. But chances are that you are wrong; you will recover much faster than you think. The basic point applies to the administrative state and its choices. People might make welfare forecasts with respect to calorie consumption or exposure to certain risks, and those forecasts might go wrong. If administrators rely on welfare forecasts as reflected in willingness to pay, they might incorporate and hence propagate errors.

A separate problem involves the *incidence* of costs and benefits, which can complicate the analysis of welfare effects, even if we put "pure" distributional considerations to one side. Suppose that a regulation would impose \$400 million in costs on relatively wealthy people and confer \$300 million in benefits on relatively poor

people. Even if the losers lose more than the gainers gain in *monetary* terms, we cannot exclude the possibility that the losers will lose less than the gainers gain in *welfare* terms.

An additional problem is that because willingness to pay depends on ability to pay, it can be a poor measure of welfare effects. A very rich person might be willing to pay a lot (say, \$2,000) for a good from which she would not get a lot of welfare. (After all, losing \$2,000 is a trivial matter, if you are very rich.) A very poor person might be willing to pay only a little (say, \$20 and no more) for a good from which she would get a lot of welfare. (After all, losing \$20 is no trivial matter, if you are very poor.) These points do not mean that a very rich person should be prevented from paying that large amount for that good, or that a very poor person should be forced to pay more than that small amount for that good. (People who like regulation often miss the latter point in particular.) But they emphatically do mean that if a very poor person, or simply a poor person, is willing to pay only a small amount to avoid a mortality risk, or to get some benefit (say, an unlawfully present citizen seeking “deferred action” from the U.S. government), that small amount is not a good measure of the welfare effects.

The most general problem is that whenever agencies specify costs and benefits, the resulting figures will inevitably have an ambiguous relationship with what they should care about, which is welfare. To be sure, it is possible that some of the problems in the two cases I have given could be significantly reduced with improved cost-benefit analysis. If children should be valued differently from adults, and elderly people differently from younger, cost-benefit analysis might be able to explain why and how. Perhaps parental anguish could be monetized as well. (Why, you might ask? It is a fair question. The answer is to figure out how to weigh both sides of the ledger; without that, how can a regulator make a sensible decision?) The same might well be true, and might more readily be true, of the increased ease of driving. But even the best proxies remain proxies, and what matters most is welfare itself.

In recent years, social scientists have become greatly interested in measuring welfare. One of their techniques is to study “self-reported well-being,” meaning people’s answers to survey questions about how satisfied they are with their lives. The promise of this technique is that it might be able to offer a more direct, and more accurate, measure of welfare than could possibly come from an account of costs and benefits (especially if that account depends on willingness to pay).<sup>5</sup> Suppose that we agree with economist Paul Dolan that welfare largely consists of two things: 1) people’s feelings of pleasure (broadly conceived) and 2) people’s feelings of purpose (also broadly conceived).<sup>6</sup> People might enjoy watching sports on television, but they might not gain much of a sense of purpose from that activity. Working for a good cause (consider working for a nonprofit or

for a government whose leaders you admire) might not be a lot of fun, but it might produce a strong sense of purpose.

If pleasure and purpose matter, and if we want to measure them, we might be able to ask people about those two variables. How much pleasure do people get from certain activities? How much of a sense of purpose? Dolan has in fact asked such questions, with illuminating results.<sup>7</sup> We are learning a great deal about what kinds of activities are pleasurable or not, and also about what kinds of activities seem to give people a sense of purpose or meaning. In the abstract, what we learn seems to tell us a lot about people's welfare, and it might offer a more direct and accurate account than what emerges from an analysis of costs and benefits. The reason is that measures of pleasure and purpose offer information about people's actual experience of their lives, rather than a projection as measured by money, and the former seems to be what most matters.

With respect to subjective well-being, the most popular existing measures take two forms. First, researchers try to assess people's "evaluative" welfare by asking questions about overall life satisfaction (or related concepts, such as happiness).<sup>8</sup> With such measures, it is possible to test the positive or negative effects of a number of life events such as marriage, divorce, disability, and unemployment.<sup>9</sup> Second, researchers try to assess people's "experienced" welfare, through measures of people's assessments of particular activities (working, commuting, being with friends, watching television).<sup>10</sup>

In fact, researchers have uncovered some systematic differences between people's overall evaluations and their assessments of their particular experiences.<sup>11</sup> Marital status is more closely correlated with experienced well-being than with evaluative well-being, though there is conflicting evidence on this point.<sup>12</sup> French people report significantly lower levels of satisfaction with their lives than Americans, but the French appear to show equal or even higher levels of experienced well-being.<sup>13</sup> (Psychologist Daniel Kahneman has suggested a partial explanation: in France, if you say you are happy, you are superficial; in the United States, if you say you are unhappy, you are pathetic.) Health states are more closely correlated with experienced well-being, though they also affect evaluative well-being.

How can the choice be made between the two measures?<sup>14</sup> The emerging consensus is that useful but different information is provided by each. On one view, questions about experienced welfare focus people on their existing emotional states, and thus provide valuable information about those states. By contrast, questions about evaluative welfare encourage people to think about their overall goals or aspirations. On this view, evaluative welfare "is more likely to reflect people's longer-term outlook about their lives as a whole."<sup>15</sup> If this is so, then the two measures do capture different kinds of values, and both are important. But it is not clear that the emerging consensus is correct, for a critical question remains: do people's answers to questions about evaluative well-being in fact reflect their

broader aspirations, or do they represent an effort to summarize experienced well-being (in which case the latter is the more accurate measure)?

True, the idea of “welfare” leaves a great deal of ambiguity, and if it is invoked for policy purposes or by governments, any particular account is highly likely to end up in contested terrain.<sup>16</sup> As made clear by Dolan (not to mention Aristotle, John Stuart Mill, and Amartya Sen), a neo-Benthamite measure, purely hedonic and focused only on pleasure and pain, would be inadequate; people’s lives should be meaningful as well as pleasant. But even if we adopt a measure that goes beyond pleasure to measure a sense of purpose as well, we might be capturing too little. We might be ignoring *qualitative differences among goods* and the general problem of *incommensurability*.

We value some things purely or principally for use; consider hammers, forks, or money. We value other things at least in part for their own sake; consider knowledge or friendship. But that distinction captures only part of the picture. Intrinsically valued things produce a range of diverse responses. Some bring about wonder and awe; consider a mountain or a work of art. Toward some people, we feel respect; toward others, affection; toward others, love. (There are of course qualitative differences among different kinds of love.) Some events produce gratitude; others produce joy; others are thrilling; others produce a sense of wonder; others make us feel content; others bring about delight. Some things are valued if they meet certain standards, like a musical or athletic performance, or perhaps a pun. In this regard, Mill’s objections to Bentham are worth quoting at length:

Nor is it only the moral part of man’s nature, in the strict sense of the term – the desire of perfection, or the feeling of an approving or of an accusing conscience – that he overlooks; he but faintly recognizes, as a fact in human nature, the pursuit of any other ideal end for its own sake. The sense of honour, and personal dignity – that feeling of personal exaltation and degradation which acts independently of other people’s opinion, or even in defiance of it; the love of beauty, the passion of the artist; the love of order, of congruity, of consistency in all things, and conformity to their end; the love of power, not in the limited form of power over other human beings, but abstract power, the power of making our volitions effectual; the love of action, the thirst for movement and activity, a principle scarcely of less influence in human life than its opposite, the love of ease. . . . Man, that most complex being, is a very simple one in his eyes.<sup>17</sup>

These points suggest the importance of having a capacious conception of welfare, one that is alert to the diverse array of goods that matter to people. Consistent with Mill’s plea, a large survey by the economist Daniel Benjamin and coauthors tests people’s concern for a list of factors that includes not only “measures widely used by economists (e.g., happiness and life satisfaction),” but also “other items, such as goals and achievements, freedoms, engagement, morality, self-expression, relationships, and the well-being of others.”<sup>18</sup>



The central and important (though not especially surprising) result, compatible with Mill's point, is that people do indeed care about those other items.<sup>19</sup> The perhaps ironic conclusion is that, if measures of reported well-being neglect those items, *they will end up losing important information that cost-benefit measures ought to be able to capture*. A significant advantage of the willingness-to-pay measure is that it should, in principle, take account of everything that people care about, including those things that matter for Mill's reasons. If people value cell phones because they want to connect with their children, or if they want to save (rather than spend) money so they can give it to impoverished children, or if they want to spend money on a vacation because of their love of nature, their concerns, however diverse in qualitative terms, should be adequately captured by the willingness-to-pay criterion, however unitary.

That is a point for cost-benefit analysis. Notwithstanding its apparent crudeness, and notwithstanding the simplicity of the monetary measure, it honors qualitatively diverse goods that people care about for diverse reasons. In that way, it is not simple at all, and for that reason, cost-benefit analysis has advantages over some measures of happiness or subjective welfare. Nonetheless, that form of analysis cannot have priority over excellent or full measures of welfare. What is required are measures that are sufficiently reflective of the diverse set of goods that matter to people but that avoid the various problems, signaled above, of cost-benefit analysis.

**W**ith respect to regulatory policy, the largest problem with invoking self-reported well-being is this: even if such surveys provide a great deal of information, we cannot easily "map" any particular set of regulatory consequences onto changes in welfare.

Although we are learning a great deal about what increases and what decreases welfare, what we are learning is relatively coarse; it frequently involves the consequences of large life events, such as marriage, divorce, and unemployment.<sup>20</sup> We do not know nearly enough about how to answer hard questions about the welfare effects of health, safety, and other regulations. For example: 1) How much happier are people when the level of ozone in the ambient air is decreased from seventy parts per billion to sixty parts per billion? 2) For the median person, what is the welfare effect of having to spend \$50 or \$100 or \$300 on a particular regulatory initiative, noting that the money could have been used for other purposes? 3) What are the welfare effects of giving unlawful noncitizens in the United States deferred action, meaning that they will not be deported and will be authorized to work? 4) In terms of "welfare units," how should we think about a loss of a job, or a life-year? Should we use those units or some other kind of unit (monetary?) in conducting analyses on the basis of studies of self-reported well-being? If we use welfare units, what, exactly, is the relevant scale?

Return to the two problems with which I began. We have seen that in terms of welfare, cost-benefit analysis, at least in its current form, may not adequately handle: 1) unusually large or unusually small numbers of life-years saved; 2) adverse unemployment effects; 3) questions about the welfare effects of small economic losses faced by large populations; 4) intense emotions associated with certain outcomes, such as parental anguish (or fear); and 5) hedonic benefits associated with increased ease and convenience. We have also seen that cost-benefit analysis does not capture distributional impacts, and that they might greatly matter. As I have suggested, improved forms of cost-benefit analysis might be able to reduce these problems (and cost-benefit analysis can of course be complemented with other inquiries; we might engage in that form of analysis and deal with distributional impacts separately). But ideally, we would want to know about welfare itself. The problem is that measures of self-reported well-being are far too crude to enable us to do that.

No one should doubt that cost-benefit analysis itself presents serious challenges, sometimes described under the rubric of “the knowledge problem”: agencies have to compile a great deal of information to make sensible extrapolations. But to map regulatory outcomes onto self-reported well-being, the challenges are far more severe. Does this conclusion mean that today and in the near future, regulators should rest content with cost-benefit analysis, and put entirely to one side, as speculative and unreliable, whatever we might learn from directly considering welfare? That would be too strong. Most important, disemployment effects deserve serious consideration, not least because of the significant adverse welfare effects of losing one’s job. It is also relevant to know whether a regulation would protect children, and hence provide a large number of life-years, or instead (and this is a far more controversial question) protect older people, and hence provide a relatively smaller number of life-years. The Department of Transportation was correct to emphasize that its rear visibility rule would disproportionately protect children.

It is also possible that a large cost, spread over a very large population, might turn out to have relatively modest adverse effects on welfare. Agencies should consider this possibility, especially in cases in which costs and benefits are otherwise fairly close. And if agencies would (for example) help people who suffer from mental illness of one or another kind, the welfare gain might be substantial, even if the benefits cannot be adequately captured in willingness-to-pay figures. Distributional effects should also be considered; they matter.

Emphasizing the promise of research on subjective well-being, economist Raj Chetty contends: “Further work is needed to determine whether and how subjective well-being metrics can be used to reliably measure experienced utility, but they appear to offer at least some qualitative information on ex post preferences [that] can help mitigate concerns about paternalism in behavioral welfare economics.”<sup>21</sup>

Chetty's conclusion is sound, but it could be much stronger. Work on subjective well-being can serve not only to mitigate concerns about paternalism but, at least on occasion, to inform analysis of the welfare effects of regulations (and policies in general). At present, inquiries into subjective well-being are too coarse to provide a great deal of help to administrators, and cost-benefit analysis is the best proxy they have for (much of) what matters. But it cannot possibly tell us everything that we need to know. In the fullness of time, it will be supplemented or perhaps even superseded by a more direct focus on welfare.

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**Cass R. Sunstein**, a Fellow of the American Academy since 1992, is the Robert Walmsley University Professor at Harvard University (on leave of absence) and Senior Counselor and Regulatory Policy Officer at the U.S. Department of Homeland Security in the Biden administration (a position he assumed after this essay was substantially completed; nothing in this essay should be taken to reflect an official position in any way). From 2009 to 2012, he served as Administrator of the White House Office of Information and Regulatory Affairs. His recent books include *Law and Leviathan* (with Adrian Vermeule, 2020), *Conformity: The Power of Social Influences* (2019), *The Cost-Benefit Revolution* (2018), and *#Republic: Divided Democracy in the Age of Social Media* (2017).

#### ENDNOTES

- <sup>1</sup> See Cass R. Sunstein, *The Cost-Benefit Revolution* (Cambridge, Mass.: The MIT Press, 2018).
- <sup>2</sup> See Jonathan Masur and Eric A. Posner, "Regulation, Unemployment, and Cost-Benefit Analysis," *Virginia Law Review* 98 (3) (2012): 580, who refer to a number of sources, including Andrew E. Clark and Andrew J. Oswald, "Unhappiness and Unemployment," *The Economic Journal* 104 (424) (1994): 648, 650–651, finding that unemployment is associated with significantly lower self-reported mental well-being; William T. Gallo, Elizabeth H. Bradley, Joel A. Dubin, et al., "The Persistence of Depressive Symptoms in Older Workers Who Experience Involuntary Job Loss: Results from the Health and Retirement Survey," *The Journal of Gerontology, Series B: Psychological Sciences and Social Sciences* 61 (4) (2006): S221, finding that older, lower net-worth workers who lose their jobs are more likely to suffer from depression than those who do not; and Knut Gerlach and Gesine Stephan, "A Paper on Unhappiness and Unemployment in Germany," *Economics Letters* 52 (3) (1996): 325, finding that unemployment reduces life satisfaction beyond what would be expected from the loss of income.
- <sup>3</sup> See Masur and Posner, "Regulation, Unemployment, and Cost-Benefit Analysis," 580.
- <sup>4</sup> For detailed discussion, see Cass R. Sunstein, "Rear Visibility and Some Unresolved Problems for Economic Analysis," *Journal of Benefit-Cost Analysis* 10 (3) (2019): 317. The example is real but the numbers are definitely not. For the actual numbers, see "Federal Mo-

- tor Vehicle Safety Standards; Rear Visibility: A Rule by the National Highway Traffic Safety Administration,” *Federal Register* 79 (66) (2014): 19178–19250.
- <sup>5</sup> Overviews can be found in Paul Dolan, *Happiness by Design: Change What You Do, Not How You Think* (New York: Avery, 2014); Daniel Kahneman, Edward Diener, and Norbert Schwarz, eds., *Well-Being: Foundations of Hedonic Psychology* (New York: Russell Sage Foundation, 2002); and Daniel Gilbert, *Stumbling on Happiness* (New York: Knopf, 2006). I am bracketing the question whether it is best to have a subjective or objective account of welfare; certainly subjective welfare matters, even if we adopt an objective account. Valuable discussion can be found in Matthew Adler, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis* (Oxford: Oxford University Press, 2011).
- <sup>6</sup> See Dolan, *Happiness by Design*.
- <sup>7</sup> See *ibid.*
- <sup>8</sup> See Richard Layard, *Happiness: Lessons from New Science* (New York: Penguin Books, 2006).
- <sup>9</sup> For discussion, see Cass R. Sunstein, “Illusory Losses,” *The Journal of Legal Studies* 37 (S2) (2008): S157.
- <sup>10</sup> Arthur A. Stone and Christopher Mackie, eds., *Subjective Well-Being: Measuring Happiness, Suffering, and Other Dimensions of Experience* (Washington, D.C.: National Academies Press, 2013).
- <sup>11</sup> Daniel Kahneman and Jason Riis, “Living, and Thinking about It: Two Perspectives on Life,” in *The Science of Well-Being*, ed. Felicia A. Huppert, Nick Baylis, and Barry Keverne (Oxford: Oxford University Press, 2005).
- <sup>12</sup> Stone and Mackie, *Subjective Well-Being*, 33.
- <sup>13</sup> See Kahneman and Riis, “Living, and Thinking about It.”
- <sup>14</sup> See *ibid.* Dolan, *Happiness by Design*, argues for the priority of experienced well-being. Stone and Mackie conclude that multiple dimensions exist and are worth measuring, see *Subjective Well-Being*, 32.
- <sup>15</sup> Stone and Mackie, *Subjective Well-Being*, 33. See also the discussion of “eudaimonic well-being,” drawn from ideas about human flourishing, *ibid.*, 18.
- <sup>16</sup> Adler, *Well-Being and Fair Distribution*.
- <sup>17</sup> See John Stuart Mill, “Bentham,” in *Utilitarianism and Other Essays*, ed. Alan Ryan (New York: Penguin Books, 1987), 132.
- <sup>18</sup> See Daniel Benjamin, Ori Heffetz, Miles S. Kimball, and Nichole Szembrot, “Beyond Happiness and Satisfaction: Toward Well-Being Indices Based on Stated Preference,” *American Economic Review* 104 (9) (2014): 2698.
- <sup>19</sup> *Ibid.*
- <sup>20</sup> For a valuable discussion, see W. Kip Viscusi, “The Benefits of Mortality Risk Reduction: Happiness Surveys vs. the Value of a Statistical Life,” *Duke Law Journal* 62 (8) (2013): 1735.
- <sup>21</sup> See Raj Chetty, “Behavioral Economics and Public Policy: A Pragmatic Perspective,” *American Economic Review* 105 (5) (2015): 25.

# The Hedgehog & the Fox in Administrative Law

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*This essay examines the constitutional muddle of the administrative state with reference to how agencies operate – it looks at a hedgehog’s problem from the fox’s perspective. Not only does the structure and delegated authority of administrative agencies often exist in substantial tension with the Constitution, but agencies regularly fail to act in a manner that promotes “constitutional values.” Drawing from my experience as regulatory czar, I explain that regulatory policy is frequently developed with little regard for separation of powers, political accountability, due process, or other values drawn from the Constitution. Proponents of the status quo thus cannot rely on such values to legitimize the ever-expanding activity of administrative agencies.*

“The fox knows many things, but the hedgehog knows one big thing.”<sup>1</sup>

I saiah Berlin’s famous dichotomy between the hedgehog and the fox posits a distinction between those who focus on big ideas and universal truths and those who focus on granular realities. In reading the essays in this volume, it struck me that the dichotomy sheds light on the fundamental debate in administrative law: namely, whether the administrative state is constitutional.

Favoring the hedgehog’s approach, I have previously raised arguments against the constitutionality of the modern administrative state.<sup>2</sup> Such arguments have gained substantial ground in recent years. Scholars have advanced textual, structural, and historical explanations for how the administrative state exists in substantial tension with the Constitution, including the expansive delegations of legislative authority to the executive branch, the existence of independent agencies,<sup>3</sup> and the combination of lawmaking, execution, and judicial functions in agencies.

In response to the constitutional critiques, some modern defenders of the administrative status quo have claimed that it is consistent with “constitutional values.” They have sought to shift the debate away from the Constitution and toward the mechanisms and structures of the administrative state they believe can replicate constitutional values and functions.<sup>4</sup> Unlike the arguments of the early Progressives, these claims depend not only on the necessity or desirability of expert

administration, but also on the insistence that the administrative state reflects and embodies constitutional values. These arguments ultimately depend on fox-like claims about how administration works in practice.

My experience as administrator of the Office of Information and Regulatory Affairs (OIRA)<sup>5</sup> provided a unique perspective from which to assess these constitutional debates – the regulatory czar must be both hedgehog and fox. To start with, there is a big idea within OIRA’s mission: namely, that the president should control regulatory policy across the dozens of agencies that make up the executive branch. Such presidential direction promotes unitary execution of the laws, consistent with the president’s power and responsibilities under Article II of the Constitution. Presidential control provides essential democratic accountability for the many discretionary decisions that make up regulatory policy. A unitary executive is designed to pursue energetically the goals for which the people elected the president. That is the hedgehog side of things. But the executive branch must also do the difficult business of executing the laws; of administering the thousands of statutes, regulations, and programs run by the federal government. This work goes on, often quite apart from whatever big ideas one might have about the administrative state. In the most practical way, OIRA operationalizes the unitary executive. Overseeing the development of regulations and regulatory policy across the executive branch, I had the opportunity to see up close how agencies work and to appreciate the foxy side of administration.

This essay draws from that experience to explain some of the infirmities of the constitutional values defense of the administrative state. From my supervision of rulemaking, guidance documents, and other regulatory policy across dozens of agencies, I explain how OIRA provides an important form of constitutional accountability. But I have also observed that many persistent features of administration work against democratic accountability, separation of powers, and due process. I discuss just a few of these problems here.

First, regulatory action often advances with little political direction or supervision, undermining claims of internal checks and balances and the development of real expertise. Second, widespread waivers and exemptions benefit those with access to agency decision-makers, similarly threatening rule of law values and distorting agency rulemaking. Finally, through regulations, guidance, and grant requirements, administrative agencies have made a relatively new foray into cultural and social areas, trampling decisions previously left to individuals, families, and local communities. Agencies often accomplish by administrative fiat actions that one can hardly imagine surviving the democratic give and take of the political process.

From my hedgehog’s perspective, the Constitution is our supreme law, the one big thing that gives our government its authority and limits. Constitutional values are only a shadow of the real thing. But even on functionalist terms, the constitutional values described by proponents of the administrative state turn out to be



more fancy than fact. The administrative state suffers constitutional infirmities not only from the hedgehog's perspective, but also the fox's.

**T**he most fundamental debate in administrative law has always concerned whether and how the administrative state can be reconciled with the Constitution.

As Justice Robert H. Jackson noted in 1952, federal agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.”<sup>6</sup> The combination of powers within administrative agencies flies in the face of the separation of powers and threatens individual liberty, democratic accountability, and the fundamental protections of due process. Scholars and jurists who look at the original meaning of the Constitution find the administrative state incompatible with the Constitution's careful vesting of distinct powers in branches with distinct features.<sup>7</sup> Perhaps most fundamental, the vesting of all legislative power in Congress means that such power cannot be delegated to the executive or the courts.<sup>8</sup> But overly broad delegations of legislative power to administrative agencies allow for the exercise of a kind of lawmaking power by the executive branch, rather than by Congress. This flies in the face of the nondelegation principle, which provides perhaps the central protection for the republican form of government under a limited Constitution.<sup>9</sup> Moreover, the sheer size and reach of the executive branch makes it difficult for the president to retain control of administration. The creation of so-called independent agencies places substantial delegated authority outside the direct control of the president, in contravention of the creation of a unitary executive and the vesting of all executive power in the president.<sup>10</sup> Finally, the courts must exercise the judicial power to say what the law is, but the complexity of regulatory decisions and the lack of a judicially enforced nondelegation principle often results in courts deferring to administrative agencies.<sup>11</sup>

It may come as a surprise that in their critiques of the administrative state, present-day originalists read the Constitution in essentially the same way as the early Progressives. Those Progressives forthrightly acknowledged that the creation of an expansive administrative state, operating under broad delegations and combining the powers of lawmaking, enforcement, and adjudication, would be fundamentally incompatible with the Constitution.<sup>12</sup> The Progressives celebrated this fact: rather than follow outmoded concerns for individual liberty and private property, the new agencies would focus on expertise and government control for the social good. Early proponents of the administrative state understood that the government they hoped to establish would stand in stark conflict with the text, structure, and purposes of the Constitution.<sup>13</sup>

Modern proponents of the administrative state break with both originalists and the early Progressives. Against the background of the expansive modern ad-

ministrative state, some defenders of the administrative state now emphasize constitutional values, largely accepting existing judicial interpretations allowing open-ended delegations and the independence of agencies from political control. Bracketing arguments about the fundamental unconstitutionality of the administrative state, they would shift the focus away from the Constitution and to constitutional values.<sup>14</sup> They propose that the administrative state is arranged and structured to reflect constitutional standards and the functional equivalent of separation of powers.<sup>15</sup>

This attempt to ground the existing administrative state in constitutional values has gained in popularity among constitutional and administrative law scholars. Gillian Metzger, one of the primary proponents of this view, has argued that “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.”<sup>16</sup> She explains that the “bureaucracy, expert and professional personnel, and internal institutional complexity” of the administrative state make “an accountable, constrained, and effective executive branch.”<sup>17</sup> These features “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.”<sup>18</sup>

Similarly, Emily Bremer has suggested that administrative law can further the separation of powers through 1) the relationships among the three branches in controlling the administrative state; 2) the relationship between the administrative state and each of the other branches; and 3) in the separation of functions within each agency.<sup>19</sup> Metzger and Kevin Stack have also emphasized the legitimacy promoted by “internal administrative law,” which they identify as the internal processes, guidelines, policies, management structures, and other procedures that serve as effective constraints on agency power.<sup>20</sup> They see internal administrative law as playing a “critical role in ensuring the legitimacy and accountability of the administrative state.”<sup>21</sup> These are just some of the variants of a general project of defending the functional constitutionality of the administrative state.<sup>22</sup>

Critics of the administrative state point primarily to law: the text, structure, and history of the Constitution. Certain arrangements are lawful or unlawful. By contrast, the broad claim that administration fits within a reconstructed range of constitutional values depends in large measure on how administration actually works. Does the expert bureaucracy provide accountability? Do the structural arrangements of administrative agencies provide checks and balances in a manner that mirrors the Constitution’s separation of powers?

The modern defenders of administration are foxes, relying not on the Constitution, but on assertions about how particular agency arrangements can reflect and promote constitutional values. This view rests on an explicit empirical claim:

the administrative state is “not just beneficial in a good government sense” but also “satisf[ies] constitutional structural requirements and . . . ensur[es] that broader separation of powers principles retain force in the world of contemporary governance.”<sup>23</sup> For instance, Metzger asserts that the administrative state “yields important constitutional benefits” and that it “performs essential constitutional functions in supervising, constraining, and effectuating executive power.”<sup>24</sup> Metzger and Stack postulate that at the “conceptual level,” “internal structures” imposed by insulating agencies from presidential control can “implement basic commitments to legality and political accountability.”<sup>25</sup> These arguments invoke the Constitution, and so have a formalist patina, but they are in fact functionalist claims that turn on how administrative law works in the real world. The constitutional values defense relies on a series of factual assertions that administrative agencies as presently structured can provide the type of accountability and constraint consistent with constitutional values.

Critically, proponents of the administrative status quo do not claim it is consistent with the Constitution, but rather maintain that administrative agencies nonetheless serve values reflected in the Constitution. I should note that I am not here addressing the difficult question of what “values” are reflected in the Constitution. The Constitution is not a hortatory document: there is no “accountability” clause or “legitimacy” clause or “separation of powers” clause. The Constitution reflects essential principles for our constitutional republic; however, it implements those principles through the creation of branches with particular features and the careful vesting of government powers in those branches. The administrative state reassigns and blends those powers in countless ways, which naturally raises the question of how constitutional values can be served outside of the Constitution’s requirements. That question lies outside the scope of this essay and in the discussion that follows I simply take the constitutional values asserted by proponents on their own terms.

**F**rom my experience as administrator of OIRA, overseeing the regulatory activity of agencies across the executive branch, I have found little evidence to support the claims that constitutional values are furthered in administrative structure or practice. In fact, many features of modern administration systematically subvert political accountability, separation of powers, expertise, and due process.

The new defenders of the administrative state make arguments that sound in constitutional theory, but they turn inexorably on facts about “constitutional benefits” and “constitutional functions.” From this perspective, constitutional law is not treated as a binding and knowable constraint, and so the validity of the constitutional values defense depends on whether administrative agencies in fact possess the claimed properties.<sup>26</sup> The theory depends on empirical realities, but proponents are long on abstractions and short on details. Supporting the claim

that the administrative state reflects constitutional values requires more than conceptual generalizations.

While I can hardly claim a comprehensive study of the operation of administration in these pages, I share some fox-like observations about the regulatory process and whether and how it reflects constitutional values, as broadly defined by proponents of this view. I start by explaining how OIRA provides one of the most effective mechanisms for promoting constitutional values in administration by ensuring presidential and White House control over regulatory policy. It cannot cure all the pathologies of administration, but OIRA review can make regulatory policy *more constitutional*. I also highlight some examples of the nitty-gritty workings of regulatory practice, explaining some persistent, and sometimes overlooked, features of administration that run headlong into values of democratic accountability, separation of powers, and expertise.

**G**iven the ever-expanding reach of regulatory policy, centralized review of significant regulations at OIRA provides an essential form of accountability, rationality, and coordination. For over forty years, the office has promoted fundamental principles of presidential control over administration and thereby democratic accountability for regulatory decisions. OIRA also advances other important principles of good government, such as public participation, coordination, and due process. In a variety of ways, the process of centralized regulatory review serves many of the constitutional values identified by defenders of the administrative state.

Because OIRA is often known as the most important office no one has ever heard of, I will briefly explain how it works.<sup>27</sup> OIRA originated with the Paperwork Reduction Act, which President Carter signed into law in 1980. President Reagan then set forth more detailed parameters for OIRA's regulatory review process in Executive Order (E.O.) 12291.<sup>28</sup> Essentially, OIRA coordinates and directs regulatory policy by reviewing economically and politically significant regulations from across the executive branch. The review process includes career experts at OIRA carefully reviewing the proposed regulation: its justifications, legal authority, and cost-benefit analysis. Just as important, the review process shares the proposed regulation with other affected agencies and White House offices, including the Counsel's Office, Domestic Policy Council, National Economic Council, and myriad other presidential advisors as appropriate. This centralized process allows political and career officials from across the executive branch and within the White House to weigh in on significant regulations from their different perspectives. Conflicts and differences of opinion are generally resolved by OIRA and, if necessary, with a meeting of agency heads and ultimately the president.

The fundamental principles guiding OIRA review have long been expressed in President Clinton's E.O. 12866, which built on President Reagan's original exec-

utive order. With unusual and thoroughgoing bipartisan support, E.O. 12866 has become foundational to the regulatory process. The Executive Order starts with a “regulatory philosophy” and articulates twelve regulatory principles.<sup>29</sup> These ideas have guided regulatory review across both Democratic and Republican administrations. They are nonpartisan principles for regulation and apply both to deregulatory and regulatory actions. E.O. 12866 is truly a constitutive document in that it does not speak to how much regulatory activity or what type of regulation an administration will pursue; instead, it sets forth a philosophy and basic principles of rationality, expertise, and public welfare. It creates mechanisms to implement these principles and promote these values.

Scholars who have very different perspectives on administrative law have advocated leaving E.O. 12866 in place, and for good reason.<sup>30</sup> Rooting White House review in this foundational document gives it a continuity and weight irrespective of the regulatory direction of an administration. Presidents invariably have their unique guiding principles for regulatory policy, but they have maintained E.O. 12866 and its fundamental principles of regulatory review.<sup>31</sup> President Trump, for example, set out to eliminate burdensome and ineffective regulations, with a focus on freeing individuals, families, and companies from unnecessary government control. It was in large measure a kind of populist deregulatory agenda, focused on promoting economic, social, and religious liberty. The goal was to make administration more constitutional and, at the same time, more effective. He maintained E.O. 12866 but issued a series of additional executive orders, including the creation of a regulatory budget and the requirement of eliminating two regulations for each new one.<sup>32</sup>

Soon after taking office, President Biden repealed some of Trump’s executive orders, but also “reaffirm[ed] the basic principles” of E.O. 12866 and called for “modernizing regulatory review” based on the values of “social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.”<sup>33</sup> As an institution, OIRA avoids conflicts about the substance of regulatory policy, instead focusing on good regulatory practices that can improve decision-making, reduce arbitrariness, and ultimately promote better outcomes for the American people. Presidents with very different regulatory approaches have remained committed to OIRA and its regulatory review function.

OIRA’s process of centralized regulatory review promotes a number of constitutional principles. First and foremost, it operationalizes the unitary executive. The Constitution vests all executive power in the president, which means that the president must be able to control and direct execution of the laws.<sup>34</sup> Such control involves superintending administration: the president serves not only as the commander in chief, but as the administrator in chief.<sup>35</sup> Although disagreement continues over the extent of such control, the very idea of “presidential administration” has widespread purchase.<sup>36</sup> In a vast administrative state, the president can-

not possibly track even major regulatory initiatives. OIRA ensures that important policies are reviewed by senior White House officials who are closest to the president and his policy agenda.<sup>37</sup> This provides essential democratic accountability because regulations will follow the election, particularly with respect to discretionary policy choices.

Second, OIRA review provides internal checks on regulatory policy. It creates a mechanism for different White House offices and agencies to review regulatory policies, providing a wider base of participation, expertise, and judgment. A regulatory problem will be vetted from a variety of different perspectives, thus checking and balancing the particular and narrow interests of a single agency and improving the legitimacy of the ultimate regulatory decision.<sup>38</sup>

Third, OIRA reduces the arbitrariness of regulatory decisions. At the outset, OIRA makes agencies answer the question of why a particular regulatory action is necessary and how it fits into the existing regulatory landscape: what is the problem to be solved and, if regulation is not required by a statute, is it a problem susceptible to a regulatory solution? Agencies must also demonstrate that their policy produces net benefits for the American people: namely, that the benefits of the regulation outweigh the costs. While debates will always exist about which costs and benefits should count, it is difficult to justify a regulation that imposes greater costs than benefits on society.<sup>39</sup> Because OIRA passes a proposed regulation through other agencies and White House offices, the process can be used to avoid duplication or to resolve conflicts, such as when agencies adopt different standards to deal with the same problem.

The primary limitation on OIRA review is its reach. Notably exempt from the OIRA review process are the regulatory actions of the historically independent agencies, despite the long-standing understanding that such review would be constitutional.<sup>40</sup> In addition, OIRA review extends to economically and politically significant regulatory actions, which includes only a subset of all regulatory activity; however, OIRA determines which regulations are significant, and so could review more regulations with additional resources.

OIRA review provides a powerful mechanism for implementing political control over the bureaucracy. In practice, OIRA and the process of regulatory review it oversees is one of the most effective institutional mechanisms to ensure constitutional administration.

**T**he administrative state extends well beyond the White House and the centralized regulatory review process at OIRA. Drawing from my experience overseeing the regulatory process, I explain a few specific ways in which the development and substance of regulatory policy undermines the constitutional values of separation of powers, democratic accountability, legitimacy, and nonarbitrariness.<sup>41</sup>



*Initiation myopia: regulatory policy without political supervision.* While an ongoing debate continues about whether and with what specificity Congress may delegate authority to agencies, expansive and numerous delegations have a consequence that is overlooked: namely, that regulations are often initiated at a very low level of government. The conventional view assumes that regulatory policy originates with an agency head or senior official, or at times with a White House directive, and that therefore the president asserts political control, at least indirectly, over delegated authority. Yet a sea of regulatory activity occurs outside of such accountability structures. Regulations, guidance documents, and policy statements sometimes find their origination and completion with a single government employee, despite the fact that Congress in most instances delegates authority to the heads of agencies.<sup>42</sup> Regulatory actions can be radically decentralized, not only away from presidential control, but without control or supervision by any accountable political official.

Faced with a significant volume of regulatory responsibility, agency heads sometimes subdelegate their statutory authority, with varying degrees of residual oversight.<sup>43</sup> Agency staff can thus seize the opportunity to identify a problem and write up an advanced notice of proposed rulemaking, then a notice of proposed rulemaking, and ultimately a final rule. Depending on the agency and its organization, and the importance of the regulation, such activity might be reviewed by senior officials; but once the regulatory ball is rolling it is very difficult to change direction, much less stop it altogether.

The problem expands when we take into account subregulatory activity, such as guidance documents and policy statements. As OIRA administrator, I asked agencies to review their guidance documents, which involved identifying them, eliminating outdated or conflicting guidance, and making the documents publicly accessible.<sup>44</sup> In many instances, this proved to be an overwhelming task. We found instances of extant guidance documents that existed nowhere but the drawer of a single employee. Agencies such as Health and Human Services frankly acknowledged that it would be impossible to identify and catalog all guidance documents. While the government binds the public with regulations and then interprets those regulations through guidance documents, some agencies could not even *identify*, much less make public and available on a website, all of their guidance documents. And although guidance documents are not formally binding, the reality is that guidance may have coercive power, not dissimilar from a statute or regulation. Agencies have significant enforcement powers, as well as control over billions of dollars of grant money, and so regulated entities frequently attempt to take shelter in guidance.<sup>45</sup>

With significant opportunities for regulatory action, a single bureaucrat can at times exercise an authority that exceeds that of a member of Congress. Consider that hundreds of bills are proposed each year by individual representatives and senators, or small groups of lawmakers. Most of these, irrespective of their

merits, get not so much as a committee hearing, much less a vote. The agency employee, however, may not only initiate but complete a regulation that affects the rights and obligations of private parties, or pen a guidance document that influences how those rights and obligations are understood and enforced.

Some agencies have a greater degree of centralized review of regulations and, of course, economically and politically significant actions go through OIRA's centralized regulatory review process, which helps "to rein in bureaucratic freelancing."<sup>46</sup> Such review, however, reaches only a small fraction of regulatory activity.<sup>47</sup> Meaningful burdens can be imposed by regulations that do not reach the threshold for OIRA review or even consideration by an agency head or other political official.

The practical reality of how regulatory discretion and power are exercised undercuts the claim that administration reflects constitutional accountability. The Constitution creates a particular type of accountability that depends on direction and supervision by politically accountable actors. In agencies, however, many decisions are made without such direction and supervision. Initiation of policy by lone, politically unaccountable employees fractures the unitary structure of execution of the laws: a single official might not know what is happening elsewhere in the agency (much less in other agencies) and is less likely to be aware of conflicting regulations or policies. It is unrealistic to assume that a person trained in a narrow area, and without involvement in her agency's broader strategic decision-making, would be able to see the big picture and whether a regulation is necessary or effective. In the absence of political oversight and direction, agency staff may, through inadvertence or design, undermine the policies of the president, the democratically elected head of the executive branch.

Moreover, fractured decision-making has only a tenuous claim to "expertise." True regulatory expertise requires not just the specialized or granular knowledge that a few officials may possess, but also a broader understanding of the existing regulatory landscape, legal requirements, and economic and social needs.<sup>48</sup> Every regulatory choice involves a series of trade-offs between various public interests, policy goals, and costs. One could hardly expect such expertise to exist in a few government officials who are unaware of the wider regulatory picture. Decisions that seem rational in isolation may in fact be unnecessary, duplicative, or arbitrary when considered in light of additional information.

Regulatory myopia is magnified when decision-making is pushed to lower levels of government. Progressives sometimes point to professional norms of the bureaucracy as providing important constraints in addition to expertise, and I was fortunate at OIRA to work with an exceptionally talented and professional career staff. Nonetheless, the incorporation of professional norms varies across agencies and also from individual to individual and so cannot adequately or consistently stand in for expertise and accountability.

Regulatory authority is often exercised in dispersed silos, a fact that challenges the claims that internal or functional separation of powers operates to check and balance administration. Administrative structures fail consistently to ensure the necessary political accountability is brought to bear on the wide range of regulatory decisions made by career staff.

*The pernicious and pervasive problem of regulatory carve-outs.* In order to avoid regulatory burdens, individuals, companies, and members of Congress acting on their behalf frequently seek exemptions. The process of creating and granting regulatory exemptions undermines the accountability, legitimacy, and expertise claims for administration.

As administrative activity expands, so too does the use of exemptions.<sup>49</sup> Exemptions, like regulations, are often secured through rent-seeking and tend to benefit those with the greatest ability to sway agency officials. Getting out from under onerous and expensive regulations can mean big business and is thus pursued by special interest groups as well as members of Congress representing industries within their districts and states. Regulatory exemptions and waivers are an insider's game, often turning on access and influence and providing little visibility and accountability. Targeted exemptions thus tend to benefit the well-heeled and connected. The disparate availability of exemptions runs against our egalitarian and democratic values, which affirm that no man (or company or congressman) should be above the law.

Exemptions can also distort incentives, resulting in less beneficial regulation and, in some cases, unnecessary and overly burdensome regulation.<sup>50</sup> While some might cheer poking holes in an otherwise onerous regulatory regime, exemptions provide short-term benefits to a few well-connected groups, which in turn only make it more likely that onerous regulations will be placed on other parties. If the primary opponents to a regulation secure an exemption before the regulation is enacted, they may in fact support the imposition of regulatory burdens on their competitors and barriers to entry for future competitors. The granting of exemptions eliminates the constituency most likely to fight against or to moderate a regulation, which in turn may result in less socially beneficial regulatory policy. Moreover, regulators often have little to lose by granting exemptions: they can be a relatively low-cost way of buying off vocal opposition and allowing the agency to move forward with an otherwise controversial policy.

Exemptions and nonenforcement practices vary across agencies and come in different shapes and sizes, more than I can canvass in this essay.<sup>51</sup> Some exemptions may be socially beneficial, such as those that tailor regulations to generate the greatest benefits at the lowest costs by, for example, exempting small entities.<sup>52</sup> Other exemptions may seek to protect important constitutional liberties, such as freedom of religious exercise.<sup>53</sup> Nonetheless, exemption practices often reflect some of the worst problems with administration. For instance, the avail-

ability of exemptions and who benefits from them is often entirely hidden from the public and therefore from political accountability. Moreover, because exemptions frequently turn on the political influence of a favored member of Congress, company, or individual, the granting of exemptions is often unconnected with expertise or good regulatory outcomes.

Agencies often have statutory authority for waivers.<sup>54</sup> Although the explicit grant from Congress may increase the legal legitimacy of exemptions, it does not necessarily improve regulatory outcomes. As Mila Sohoni has explained, waivers and delay can undermine the “administrative constitution.” She identifies problems in a number of areas, including immigration policy and the Deferred Action for Childhood Arrivals waiver program, health care and Affordable Care Act waivers, and education and the No Child Left Behind waiver program.<sup>55</sup> Another example is the Dodd-Frank Wall Street Reform and Consumer Protection Act, which creates substantial discretion within several financial regulatory agencies, expanding waiver authority.<sup>56</sup> Richard Epstein has argued that agency discretion “can end up blurring the line between coercive power and waiver power in a way that grants these agencies an immense amount of informal authority – authority that extends well beyond the powers they are granted by Congress.” He identifies the Food and Drug Administration’s process for new drug approval as a prime example.<sup>57</sup> Others have focused on renewable fuel standard credits, which involve ongoing, intense rent-seeking, and are the subject of litigation in the courts of appeals and the Supreme Court.<sup>58</sup>

Moreover, waivers are distinct from the executive branch’s traditional non-enforcement power. When the government declines to enforce the law, the law remains the same and could be enforced if circumstances change. On the other hand, waivers purport to change the law, granting a specific exemption or reprieve from certain legal requirements. This distinction may particularly matter in regulatory areas, such as environmental law, where Congress has authorized citizen suit enforcement. Agencies sometimes argue against judicial review of waivers, maintaining that those who are subject to regulatory requirements lack standing to challenge a waiver given to a different person.<sup>59</sup>

The process of regulatory exemptions highlights another institutional and constitutional difficulty. The executive power includes a discretionary authority not to prosecute or not to enforce administrative requirements. Congress has set general laws through the legislative process and the executive branch can exercise a discretionary nonenforcement power, consistent with a system of checks and balances. In the regulatory space, however, the agencies both write the “law” through regulation and then determine who is exempt from it. Administrative rulemaking thus blends general lawmaking power with the execution of those laws.<sup>60</sup> The collapsing of these functions further undercuts the claims that agencies effectively embody constitutional values and internal separation of powers.

*Social values and administration.* While the discussion of initiation myopia and exemptions focuses on procedural or structural problems with administration, the substance of regulatory policy increasingly raises constitutional concerns. Agency regulation on hot-button moral, ethical, and social issues challenges the democratic legitimacy of administration. One of the most important constitutional principles is that separation of powers serves individual liberty and protects against government intrusions on individual rights. The Article I, Section 7 requirements of bicameralism and presentment make it difficult for Congress to act on issues about which Americans are divided, and action on such matters is usually possible only with compromise and a minimalist approach. The administrative state unravels many of these fundamental protections.

There is a substantial and important literature on the economic impacts of regulation and how it infringes individual liberty by tangling individuals and businesses in red tape. There is scant discussion, however, on how the administrative state – regulations as well as welfare transfers with conditions – distorts not just the marketplace, but also family life, community, and religious practice. Regulatory approaches to hot-button cultural issues demonstrate that agencies lack the restraints incorporated into constitutional checks and balances. We live in a pluralist society in which Americans have diverse, and sometimes incommensurate, religious, cultural, and social values. Divisions among Americans make a uniform federal approach difficult to enact, and so it is hardly surprising that Congress virtually never legislates on matters such as abortion, contraception, or affirmative action.

Instead, Congress has delegated substantial authority to agencies, authority that agencies increasingly use to impose federal mandates that implicate matters of life and death, religious practice, marriage, and the family. For example, the Equal Employment Opportunity Commission sought to regulate church hiring decisions, a regulatory action found unconstitutional by the Supreme Court.<sup>61</sup> Whereas the far-reaching Affordable Care Act was silent on contraception, Health and Human Services imposed a regulation mandating the provision of contraception by employers.<sup>62</sup> Agencies also use regulatory action and federal funding to condition whether domestic and foreign entities provide abortion, an issue that whipsaws from administration to administration. It is difficult to imagine Congress passing any of these regulations through the ordinary legislative process.

The involvement of agencies on such matters is a relatively new development. For most of U.S. history, the federal administrative state had nothing whatsoever to say about religious and moral questions. The expansion of federal programs, grants, and transfer programs has provided agencies with numerous levers to impose social policy in a way that takes sides in the culture wars. The Constitution largely left these issues to local and state governments, but federal agencies increasingly issue sweeping regulations that leave little room for disagreement and accommodation of different viewpoints and beliefs.

Many Americans consider such intrusions deeply illegitimate and unconstitutional, and oblivious to differences in religious and community norms. In particular, Americans with sincerely held religious beliefs increasingly find their views under siege by administrative agencies. The reality is that the federal bureaucracy largely (though of course not exclusively) reflects a particular class of workers that is not representative of Americans as a whole. For example, although recent elections reflect a country fairly divided between Democrats and Republicans, political donations from agency workers skew overwhelmingly to Democrats.<sup>63</sup> Unlike the legislative process, which brings together representatives from around the country who reflect their communities' diverse beliefs and mores, agency workers tend to represent a narrower political class centered in Washington, D.C.

Problems of legitimacy and accountability do not run exclusively in one direction. Presidents pursuing conservative regulatory policy will no doubt frustrate progressive Americans. Administrations are directed, quite appropriately, by the president, and on controversial issues, administrations will follow the president's policies, though not always with the moderating influence of legislation. The difficulty of enacting legislation means that presidents will seek to capitalize on their control over administrative agencies. On disputed matters, about which agencies often have substantial discretion, internal checks and balances may fail to provide legitimacy and accountability for those on the losing side of regulatory policy.

Congress rarely legislates on cultural issues because members cannot reach consensus or compromise on what are often contentious questions. In part, this reflects our Constitution at work: when a common federal approach cannot be reached, individuals are left free to follow their beliefs and work within their communities to resolve problems through state and local political processes. By contrast, the ever-expanding administrative state is not content to leave such matters to individuals, families, and their local communities. Sweeping regulatory approaches to cultural issues demonstrate how the administrative state fails to promote the legitimacy, accountability, and protection for individual liberty at the heart of our Constitution.

Administration often falls short of constitutional values because it often falls short of the Constitution. Restoring Congress as the central lawmaking body in our federal government would go a long way to making administration more constitutional. Delegations to the executive branch have upended our system of government, distorting not just the lawmaking power but also the executive and judicial powers. Holding that hedgehog's idea, however, will not cure the pathologies of administration, at least not right away. The relationship between big ideas and more ordinary facts is complex, in administrative law no less than in political philosophy. Absent a substantial realignment of the administrative state, important work remains for the fox. As I learned at OIRA,



faithful execution of the laws means ensuring agencies stay within their delegated authority, follow processes that encourage political accountability, and promote due process in the creation and enforcement of regulatory policy. The exercise of the judicial power reflects a different institutional balance between hedgehog and fox, but that is a topic for another day.

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#### AUTHOR'S NOTE

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The Honorable **Neomi Rao** is a Circuit Judge on the U.S. Court of Appeals for the District of Columbia Circuit. She served as the Administrator of the Office of Information and Regulatory Affairs from 2017 to 2019.

#### ENDNOTES

- <sup>1</sup> Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (London: Weidenfeld & Nicolson, 1953) (quoting a fragment from the Greek poet Archilochus).
- <sup>2</sup> See, for example, Neomi Rao, "Why Congress Matters: The Collective Congress in the Structural Constitution," *Florida Law Review* 70 (1) (2018): 1; and Neomi Rao, "Removal: Necessary and Sufficient for Presidential Control," *Alabama Law Review* 65 (5) (2014): 1205.
- <sup>3</sup> So-called independent agencies are historically understood to be independent of presidential control, because the heads of such agencies cannot be removed at will by the president.
- <sup>4</sup> Several essays in this volume similarly discuss practical facts of how administration works. Some identify further problems with an account of administration serving constitutional values. See Mark Tushnet, "Introduction: The Pasts & Futures of the Administrative State," *Dædalus* 150 (3) (Summer 2021).
- <sup>5</sup> An office within the Office of Management and Budget, OIRA leads a centralized process of White House review of significant regulatory actions. As explained more below, that process includes careful economic and legal analysis and coordination of regulatory policy across the executive branch.
- <sup>6</sup> See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Robert H. Jackson dissenting).

- <sup>7</sup> See, for example, Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). See also John Marini, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century* (New York: Encounter Books, 2019); Dean Reuter and John Yoo, eds., *Liberty's Nemesis: The Unchecked Expansion of the State* (New York: Encounter Books, 2016); and Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (6) (1994): 1231.
- <sup>8</sup> U.S. Constitution, Article I, Section 1.
- <sup>9</sup> See Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," *New York University Law Review* 90 (5) (2015): 1463, 1494–1496; Gary Lawson, "Delegation and Original Meaning," *Virginia Law Review* 88 (2) (2002): 327, 335–337; *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 74 (2015) (Clarence Thomas, concurring in the judgment, noting that the Constitution and "the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct").
- <sup>10</sup> U.S. Constitution, Article II, Section 1. See also Rao, "Removal."
- <sup>11</sup> See U.S. Constitution, Article III, Section 1.
- <sup>12</sup> For example, Frank Goodnow argues that the U.S. Constitution focuses on individual rights drawn from natural rights theory and the political philosophy of the eighteenth century, but that conditions have changed and "we no longer believe as we once believed that a good social organization can be secured merely through stressing our rights. The emphasis is being laid more and more on social duties. The efficiency of the social group is taking on in our eyes a greater importance than it once had." Frank Goodnow, "The American Conception of Liberty," in *American Progressivism: A Reader*, ed. Ronald J. Pestritto and William J. Atto (Lanham, Md.: Lexington Books, 2008). See also Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (2) (1887): 197, 209–210 (noting that administration is "removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study"); and Roscoe Pound, "Justice According to Law," *The Mid-West Quarterly* 1 (3) (1914): 223 (explaining that while Americans previously took it as "an axiom that the people themselves were subject to certain fundamental limitations, running back of all constitutions and inherent in the very nature of free government," now "a great change has gone forward . . . the present generation seems eager to reject the idea of a fundamental law . . . [and] is eager to unshackle administration, to take away judicial review of administrative action").
- <sup>13</sup> See, for example, James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938), 12 (the government "vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization"). See also Lawson, "The Rise and Rise of the Administrative State," 1231 ("The original New Dealers were aware, at least to some degree, that their vision of the national government's proper role and structure could not be squared with the written Constitution").
- <sup>14</sup> To be sure, other scholars have provided originalist defenses of delegations that form the basis for the modern administrative state. See, for example, Julian Davis Mortenson and Nicholas Bagley, "Delegation at the Founding," *Columbia Law Review* 121 (2) (2021): 277, 282 (surveying historical practice and concluding that "the nondelegation doctrine

has nothing to do with the Constitution as it was originally understood”); and Nicholas R. Parrillo, “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s,” *Yale Law Journal* 130 (6) (2021): 1288, 1313 (exploring the direct tax of 1798 as “important evidence that the American political nation in the Founding era viewed administrative rulemaking as constitutional, even in the realm of domestic private rights”).

<sup>15</sup> Jeremy Kessler and Charles Sabel term this a “progressive synthesis.” See Jeremy Kessler and Charles Sabel, “The Uncertain Future of Administrative Law,” *Dædalus* 150 (3) (Summer 2021).

<sup>16</sup> Gillian E. Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017): 1, 7.

<sup>17</sup> *Ibid.*, 72.

<sup>18</sup> *Ibid.*, 78.

<sup>19</sup> Emily S. Bremer, “The Unwritten Administrative Constitution,” *Florida Law Review* 66 (3) (2014): 1215, 1250–1252.

<sup>20</sup> Gillian E. Metzger and Kevin M. Stack, “Internal Administrative Law,” *Michigan Law Review* 115 (8) (2017): 1239, 1248; and Christopher J. Walker and Rebecca Turnbull, “Operationalizing Internal Administrative Law,” *Hastings Law Journal* 71 (5) (2020): 1225.

<sup>21</sup> Metzger and Stack, “Internal Administrative Law,” 1266.

<sup>22</sup> See also John A. Rohr, *To Run a Constitution* (Lawrence: University Press of Kansas, 1986): 171 [describing the new separation of powers as “(1) the combination of powers in administrative agencies does not violate Publius’s relaxed standard of separation of powers, (2) the higher reaches of the career civil service fulfill the constitutional design of the framers by performing a balancing function originally assigned to the Senate, and (3) the career civil service en masse heals the defect of inadequate representation in the Constitution”]; and Jessica Bulman-Pozen, “Administrative States: Beyond Presidential Administration,” *Texas Law Review* 98 (2) (2019): 265, 271–272.

<sup>23</sup> Metzger, “1930s Redux,” 78.

<sup>24</sup> *Ibid.*, 7, 95. See also Aaron L. Nielson, “Confessions of an Anti-Administrativist,” *Harvard Law Review Forum* 131 (1) (2017): 1–2 (acknowledging that “in a world in which delegation is ubiquitous, sometimes the administrative state itself can serve an important ‘cabining’ role on the exercise of delegated power”).

<sup>25</sup> Metzger and Stack, “Internal Administrative Law,” 1306.

<sup>26</sup> Several scholars have questioned whether agencies have the properties claimed by the classical model of administrative law. See, for example, Daniel A. Farber and Anne Joseph O’Connell, “The Lost World of Administrative Law,” *Texas Law Review* 92 (5) (2014): 1137, 1140 [“The actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed. . . . The mismatch (or legal fictions), in turn, has consequences for the legitimacy and efficacy of the federal bureaucracy. . . . We therefore need to rethink current approaches to bureaucratic operation and oversight if we still want to achieve administrative law’s goals of transparency, rule of law, and reasoned implementation of statutory mandates”]; and Mila Sohoni, “The Administrative Constitution in Exile,” *William and Mary Law Review* 57 (3) (2016): 923, 927 (“The administrative constitution is widely hailed as a meaningful checkpoint that rationalizes and legitimates consequen-

tial administrative action—and is also dismissed as an outmoded set of rules that no longer has real purchase on a significant set of such actions”).

- <sup>27</sup> See also Christopher C. DeMuth and Douglas H. Ginsburg, “White House Review of Agency Rulemaking,” *Harvard Law Review* 99 (5) (1986): 1075, 1081 (“Centralized review of proposed regulations under a cost/benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation. It encourages policy coordination, greater political accountability, and more balanced regulatory decisions”); and Cass R. Sunstein, “The Office of Information and Regulatory Affairs: Myths and Realities,” *Harvard Law Review* 126 (7) (2013): 1838, 1875 (discussing the role of OIRA as an “information aggregator” allowing for White House oversight of executive branch rulemaking).
- <sup>28</sup> “Executive Order 12291 of February 17, 1981: Federal Regulation,” *Federal Register* 46 (33) (1981): 13193.
- <sup>29</sup> The “regulatory philosophy” centers on the idea that agencies should regulate only when “required by law,” “necessary to interpret the law,” or necessary to address some “compelling public need.” See “Executive Order 12866 of September 30, 1993: Regulatory Planning and Review,” *Federal Register* 58 (190) (1993): sec. 1(a). Pursuant to this philosophy, the regulatory principles require an agency to, among other things, identify and assess the significance of the problem it seeks to address, assess all costs and benefits of the proposed regulation as well as regulatory alternatives, consider impacts on innovation, predictability, and distributive impacts, and “tailor . . . regulations to impose the least burden on society.” See *ibid.*, sec. 1(b)(1–3).
- <sup>30</sup> Former OIRA administrators from both Republican and Democratic administrations, while reflecting different philosophies about the role of OIRA, defend the concept of centralized review of agency regulations. See, for example, Christopher Demuth, “OIRA at Thirty,” *Administrative Law Review* 63 (2011): 15, 16 (recounting the “policy constancy across Republican and Democratic administrations” that suggests “OIRA policies and procedures have addressed a problem that is in significant respects apolitical”); Sally Katzen, “OIRA at Thirty: Reflections and Recommendations,” *Administrative Law Review* 63 (2011): 103, 105 (arguing that E.O. 12866 “put to rest or relegated to the back burner” “questions about the legitimacy of OIRA review, the integrity of OIRA review, and the appropriateness of OIRA review”); and Susan E. Dudley, “Observations on OIRA’s Thirtieth Anniversary,” *Administrative Law Review* 63 (2011): 113, 117 (describing E.O. 12866 as foundational and noting that “regardless of a candidate’s perceived views on regulations, once elected, every president since Richard Nixon has chosen to require analyses of new regulatory proposals and to authorize an entity within the Executive Office of the President to evaluate those analyses”).
- <sup>31</sup> Executive Order 12866 remains in effect, although presidents have called for its review. See, for example, “Executive Order 13258 of February 26, 2002: Amending Executive Order 12866 on Regulatory Planning and Review,” *Federal Register* 67 (40) (2002): 9385; “Executive Order 13563 of January 18, 2011: Improving Regulation and Regulatory Review,” *Federal Register* 76 (14) (2011): 3821; “Executive Order 13771 of January 30, 2017: Reducing Regulation and Controlling Regulatory Costs,” *Federal Register* 82 (22) (2017): 9339; and “Memorandum of January 20, 2021: Modernizing Regulatory Review,” *Federal Register* 86 (15) (2021): 7223.
- <sup>32</sup> See “Executive Order 13771 of January 30, 2017: Reducing Regulation and Controlling Regulatory Costs,” 9339; and “Executive Order 13777 of February 24, 2017: Enforcing the Regulatory Reform Agenda,” *Federal Register* 82 (39) (2017): 12285. See also The Ed-

itorial Board, “The Great Rules Rollback,” *The Wall Street Journal*, December 25, 2017, <https://www.wsj.com/articles/the-great-rules-rollback-1514237372>.

<sup>33</sup> “Memorandum of January 20, 2021: Modernizing Regulatory Review,” 7223.

<sup>34</sup> U.S. Constitution, Article II, Section 1.

<sup>35</sup> See Rao, “Removal,” 1275.

<sup>36</sup> See, for example, Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (8) (2001): 2245, 2339–2340 (noting that regulatory review and “central presidential oversight could identify and then eliminate the inconsistencies and redundancies” and also promote “more rational setting of administrative priorities”); Steven Croley, “White House Review of Agency Rulemaking: An Empirical Investigation,” *The University of Chicago Law Review* 70 (3) (2003): 821, 873–882 (arguing that greater presidential involvement in rulemaking through OIRA is desirable); and Peter M. Shane, “Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking,” *Arkansas Law Review* 48 (1) (1995): 161, 164 (noting that “regulatory oversight, if implemented in the spirit that animates the prose of Executive Order No. 12866, promises a significant gain in political accountability”).

<sup>37</sup> See “Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies,” *Opinions of the Office of Legal Counsel* 43 \_\_ (October 8, 2019) (“OIRA’s regulatory review process, which draws on the expertise of the entire government, has come to provide an essential mechanism to ensure unity and coherence in execution of the law”).

<sup>38</sup> John McGinnis has suggested that under broad delegations, OIRA serves the same purposes as bicameralism by putting “an additional screen between government decrees and the citizen by filtering out special interest regulations from those in the public interest,” and that “the substance of the cost-benefit analysis mandated by the regulatory review order helps screen public interest regulations from those sought by special interests—an implicit objective of the original Constitution’s requirements for legislative enactments.” John O. McGinnis, “Presidential Review as Constitutional Restoration,” *Duke Law Journal* 51 (3) (2001): 901, 903–904.

<sup>39</sup> See Cass R. Sunstein, “Is Cost-Benefit Analysis for Everyone?” *Administrative Law Review* 53 (1) (2001): 299, 301–304 (“The basic idea [behind cost-benefit analysis] is that it is exceedingly difficult to choose the appropriate level of regulation without looking at both the benefit and cost sides”). See also *Business Roundtable v. Security Exchange Commission*, 647 F.3d 1144, 1148–1149 (D.C. Cir. 2011) (vacating a rule when the Securities and Exchange Commission “failed once again . . . adequately to assess the economic effects of a new rule”).

<sup>40</sup> See “Extending Regulatory Review Under Executive Order 12866,” 5–7 (concluding the president may direct independent agencies to comply with the OIRA regulatory review process and discussing the views of the Reagan and Clinton administrations that OIRA review of independent regulatory agencies would be constitutional).

<sup>41</sup> The full exploration of examples is outside the scope of this essay, so I focus on illustrative features that are discussed infrequently, if at all.

<sup>42</sup> Congress usually vests rulemaking authority in constitutional officers, most commonly the head of an agency, a principal officer who must be appointed by the president with the advice and consent of the Senate. Expertise might be the guiding light of ad-

ministration, but it must be applied to policies chosen by democratically accountable officials.

- <sup>43</sup> Some agencies have sought to reform their procedures, such as the Department of Transportation, which issued a regulation establishing practices to improve the accountability and quality of rulemaking and enforcement. See Department of Transportation and Office of the Secretary of Transportation, “Administrative Rulemaking, Guidance, and Enforcement Procedures,” *Code of Federal Regulations* (Washington, D.C.: Office of the Federal Register, 2020), sec. 5.13(b)(1)(i) (requiring, with some exceptions, that “all [Department of Transportation] rulemakings are to be reviewed and cleared by the Office of the Secretary”).
- <sup>44</sup> Statement of Hon. Neomi Rao, Reviewing the Office of Information and Regulatory Affairs: Hearing Before the Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs, Senate Hearing 115-275, 115th Cong., 2nd sess., April 12, 2018 (“As part of our reform efforts, OIRA encourages and incentivizes agencies to identify guidance that can be repealed, modified, or reissued through a rulemaking. We have also prompted agencies to begin identifying existing guidance documents and to start making such documents more readily available to the public, such as on agency websites. The identification process can be a first step to eliminating outdated or unnecessary guidance and streamlining existing requirements”); and Office of Management and Budget, Executive Office of the President, “Guidance Implementing Exec. Order 13891, Titled ‘Promoting the Rule of Law through Improved Agency Guidance Documents,’” M-20-02 (Washington, D.C.: Executive Office of the President, 2019).
- <sup>45</sup> See, for example, U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter,” April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also Jacob Gersen and Jeannie Suk, “The Sex Bureaucracy,” *California Law Review* 104 (4) (2016): 881, 908 (explaining that the Office for Civil Rights “threatened to terminate federal funding to schools unless they adopted policies and procedures that complied” with the Dear Colleague Letter’s requirements).
- <sup>46</sup> William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35 (1) (2005): 76, 91.
- <sup>47</sup> The Unified Agenda of Regulatory and Deregulatory Actions, a list of all regulatory actions planned by agencies, typically includes between three and four thousand regulations, but OIRA annually reviews only about five to seven hundred regulatory actions. See, for example, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, “Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions,” <https://www.reginfo.gov/public/do/eAgendaMain> (accessed April 24, 2021) (compiling all regulatory actions planned by each agency). See also Clyde Wayne Crews Jr., “Trump’s Final 2020 Unified Agenda on Regulatory Reform, By the Numbers,” *Forbes*, December 10, 2020, <https://www.forbes.com/sites/claywecrews/2020/12/10/trumps-final-2020-unified-agenda-on-regulatory-reform-by-the-numbers/?sh=555e4cae11c8>; and Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, “Frequently Asked Questions” (accessed April 24, 2021), <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp>.
- <sup>48</sup> See, for example, Sidney A. Shapiro, “The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences,” *Wake Forest Law Review* 50 (5) (2015): 1097, 1105–1116 (explaining that “public administration expertise” is “more complex



and multifaceted than is generally understood” in part because it requires specialized expertise in “the production of needed information, the assessment of the feasibility of rules, political judgments, rulemaking management, and final decision making”).

- <sup>49</sup> See generally Sean D. Croston, “An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure,” *Administrative Law Review* 64 (1) (2012): 295 (discussing the increased use of regulatory exemptions and the procedural guidelines surrounding their use).
- <sup>50</sup> There is only a scant literature around the public choice of exemptions and my observations are drawn primarily from personal experience. See generally C. Steven Bradford, “The Cost of Regulatory Exemptions,” *UMKC Law Review* 72 (4) (2004): 857, 876 (noting the limited literature on exemptions and explaining that “the case for regulatory exemptions is more complicated” and requires considering “the transaction costs of exemptions, such as specification costs, strategic behavior, enforcement costs, and any third-part[y] information costs”).
- <sup>51</sup> See generally Aaron L. Nielson, “Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices,” Report to the Administrative Conference of the United States, November 1, 2017, [https://www.thecre.com/pdf/20171112\\_waivers.pdf](https://www.thecre.com/pdf/20171112_waivers.pdf) (discussing a survey of federal agencies on their nonenforcement practices and observing that “agency nonenforcement is . . . not monolithic”).
- <sup>52</sup> For example, a regulation to protect sea turtles required the installation of expensive equipment on shrimp trawlers but exempted small fishing boats because they had little risk of harming sea turtles and such requirements would likely drive small subsistence fisherman out of business. See “Sea Turtle Conservation; Shrimp Trawling Requirements,” *Federal Register* 84 (245) (2019): 70048. Congress also requires agencies to take into account the effect of regulations on small entities. See Regulatory Flexibility Act of 1980, Public Law No. 96–354, sec. 2(b), 94 Stat. 1164, 1165 (1980), codified as amended at 5 U.S. Code sec. 603(a) (establishing “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation”).
- <sup>53</sup> For example, regulations implementing the Affordable Care Act provided an exemption for employers with religious and moral objections from providing contraceptive services. Those exemptions were upheld by the Supreme Court. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).
- <sup>54</sup> See David J. Barron and Todd D. Rakoff, “In Defense of Big Waiver,” *Columbia Law Review* 113 (2) (2013): 265, 267 (noting an “increasingly important” but “underappreciated” delegation to agencies of “broad, discretionary power to determine whether the rule or rules that Congress *has* established should be dispensed with. It is the delegation, in other words, of the power to waive Congress’s rules”).
- <sup>55</sup> Sohoni, “The Administrative Constitution in Exile,” 923, 946–956 (“The constraints of the administrative constitution have had little purchase on the executive’s exercise of waiver and delay—powers that have become increasingly consequential”).
- <sup>56</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010); and Richard A. Epstein, “Government by Waiver,” *National Affairs*, Spring 2011, <https://nationalaffairs.com/publications/detail/government-by-waiver>.

<sup>57</sup> Ibid.

<sup>58</sup> See *Renewable Fuels Association v. HollyFrontier Cheyenne Refining, LLC*, 948 F.3d 1206 (10th Cir. 2020), certiorari granted 141 S. Ct. 974 (2021) (addressing challenge to an Environmental Protection Agency exemption for small refineries from the Clean Air Act’s renewable fuels mandate). See generally Cary Coglianese, Gabriel Scheffler, and Daniel E. Walter, “Unrules,” *Stanford Law Review* (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3701841](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701841) (describing the Environmental Protection Agency’s grant of a “financial hardship waiver” from the requirement to purchase renewable fuel credits as an example of “[u]ndue business influence” over agencies and pointing out that businesses have “incentives to seek to use [waivers and exemptions] to get out from under regulations and avoid the compliance costs that other firms must bear”).

<sup>59</sup> See, for example, Brief for Respondents at 17–18, *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (“The California regulations for which the waiver was granted directly regulate only vehicle manufacturers, who have not challenged the grant of the waiver. . . . Petitioners are not themselves the subject of the agency action being challenged, they must come forward with specific facts to demonstrate that they have an identifiable member who has suffered a redressable injury from the waiver grant”).

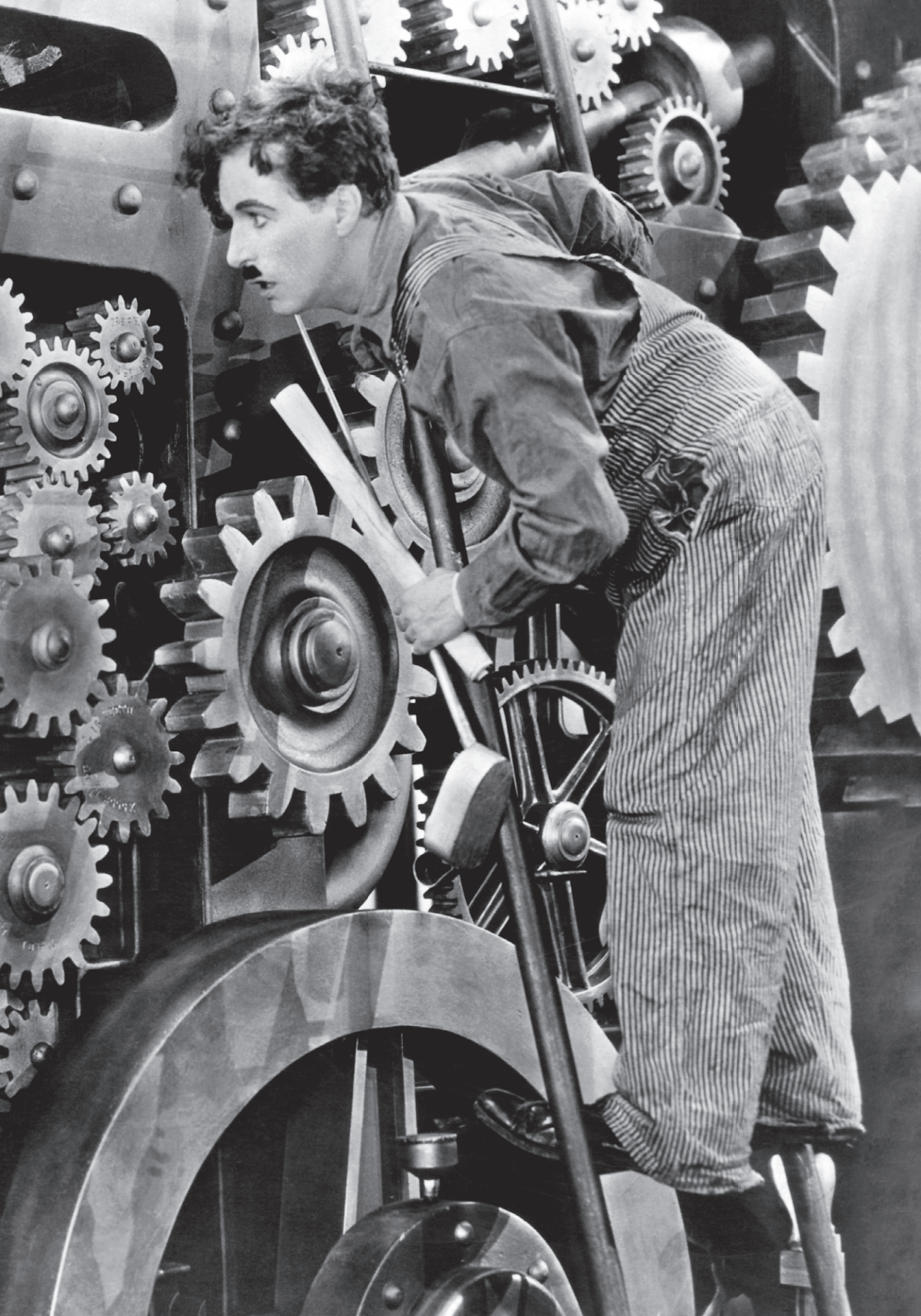
<sup>60</sup> The Constitution explicitly removed Congress from any role in the execution of laws, precisely because the framers thought such a dual role would distort the general law-making power: it would affect how the “general good” was ascertained by focusing on particular concerns. See Rao, “Why Congress Matters,” 8 (“Legislation can be corrupted by a focus on execution and particular applications of the law. The executive cannot make the laws because it is concerned with the particular and is not a collective representative body empowered to reflect the general will”).

<sup>61</sup> See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 196 (2012) (holding that the First Amendment’s ministerial exception barred an employment discrimination suit against a religious employer because the employee was a minister within the meaning of that exception).

<sup>62</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–692 (2014) (invalidating the application of a contraception mandate regulation to three closely held corporations because the regulation imposed “a substantial burden on religious exercise” and was not “the least restrictive means” of achieving a compelling government interest).

<sup>63</sup> See, for example, Philip Bump, “What Campaign Contributions Tell Us about the Partisanship of Government Employees,” *The Washington Post*, December 27, 2018, <https://www.washingtonpost.com/politics/2018/12/27/is-trumps-dismissal-unpaid-government-employees-democrats-accurate/> (showing that 82 percent of 2018 contributions from Treasury Department employees went to Democrats, while for Justice, Agriculture, and Homeland Security, the percentages were 79, 72, and 60, respectively); and Jonathan Swan, “Government Workers Shun Trump, Give Big Money to Clinton,” *The Hill*, October 26, 2016, <https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign> (“Of the roughly \$2 million that federal workers from 14 agencies spent on presidential politics by the end of September, about \$1.9 million, or 95 percent, went to the Democratic nominee’s campaign”).





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