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## RESPONSES

## CONFESSIONS OF AN “ANTI-ADMINISTRATIVIST”†

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You got me, I confess: I’m an “anti-administrativist.”<sup>1</sup> Of course, I am not entirely sure what that means, and I certainly do not embrace all criticisms of the administrative state. But I do think administrative law is a work in progress and has its share of problems. From this year’s Foreword, I learn that makes me an anti-administrativist. But you know what? You probably are an anti-administrativist too! And if you aren’t, well, you should be. The truth is that the administrative state is not “under siege” because some sinister cabal has started singing from old hymnals. Instead, it is because administrative law can be *better* as a matter of procedural fairness, substantive outcomes, and compliance with statutory and constitutional law. Recognizing that the administrative state has value but that it also is fallible and sometimes loses its way is the essence of anti-administrativism — at least the anti-administrativism I confess to.

In this spirit of confession, I am pleased to respond to the Foreword. And I will say upfront that Professor Gillian Metzger’s analysis is timely and insightful. That should be no surprise — she knows her stuff. Her bottom-line conclusion, moreover, is provocative. One should not dismiss out of hand her claim 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>2</sup> Nonetheless, despite its virtues, I fear the Foreword does not fully capture what is driving calls for additional restraints on agencies. The hard reality is that 1930s administrative law is not a good fit for today. In fact, it was not a good fit for the 1930s — which is why Congress reformed it in the 1940s. Unfortunately, the system created in the 1940s does not always work as

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<sup>1</sup> Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017).

<sup>2</sup> *Id.* at 87.

well as it once did or was intended. And figuring out what to do next requires asking and answering difficult questions.

In this short space, I cannot respond to every point the Foreword makes. But I can offer four quick thoughts. First, although I will accept a label if I must, dividing the world between “anti-administrativists” and those who are “committed to the administrative project”<sup>3</sup> is not helpful. These labels are so broad that essentially everyone falls into both camps. Second, I agree that focusing on history is important, but the lessons it teaches are more complicated than the Foreword captures. In truth, much has changed since the Administrative Procedure Act<sup>4</sup> (APA) was enacted in 1946, and new dynamics are straining the old system. Thus, I do not think it is accurate to say that calls for reform threaten the “order that has governed for the last eighty years”<sup>5</sup> because there is no such continuous “order.” Third, because its historical analysis does not account for all that has changed, the Foreword may misdiagnose what motivates the Supreme Court’s and Congress’s renewed interest in administrative law. And finally, Professor Metzger is right that today’s skepticism is not a “passing craze.”<sup>6</sup> Yet rather than bemoaning what may be coming round the bend, regulatory scholars should start looking for common ground.

#### I. WHAT DOES IT MEAN TO BE ANTI-ADMINISTRATIVE?

At the outset, consider how the debate has been framed. The Foreword labels me an “anti-administrativist.”<sup>7</sup> I accept the label because, apparently, it also includes a majority of members of Congress,<sup>8</sup> at least four justices of the Supreme Court (and that number should be higher),<sup>9</sup> a bipartisan collection of former Presidents,<sup>10</sup> legal academics holding a

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<sup>3</sup> *Id.* at 33.

<sup>4</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

<sup>5</sup> Metzger, *supra* note 1, at 64.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *See id.* at 32 & n.183 (citing Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014)).

<sup>8</sup> *See id.* at 10–12.

<sup>9</sup> *See id.* at 3 (listing Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch). For some reason, Justice Kennedy is excluded, even though he has joined many “anti-administrativist” opinions, including the Chief Justice’s dissent in *City of Arlington v. FCC*, 569 U.S. 290 (2013). If one includes *Citizens United v. FEC*, 558 U.S. 310 (2010), which the Foreword does, *see* Metzger, *supra* note 1, at 28 — though I would not — then Justice Kennedy authored one. And shouldn’t Justice Breyer be included? He wrote *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which did not make it easier for agencies. He also approves of “context-specific” limits on deference. *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring). Indeed, *all* of the Justices have joined “anti-administrativist” opinions. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120 (2012).

<sup>10</sup> *See* Metzger, *supra* note 1, at 13–15.

wide variety of views,<sup>11</sup> and a Nobel Prize winner.<sup>12</sup> No doubt, many of the ideas coming from this group are not worth pursuing, and the group surely has some bad eggs — every group does. But if that is the club, I am pleased to be a member.

Even so, I am not sure *why* I’m a member. The Foreword distinguishes between “anti-administrativists” and “those who are committed to the administrative project.”<sup>13</sup> The problem is I have never met *anyone* who is opposed to “the administrative project.” Maybe at the fringe of the fringe of society, someone thinks *all* administrative action is bunk. And maybe someone, somewhere, thinks the administrative state can do no wrong. But 99.999% of us are somewhere in between. In fact, if being an “anti-administrativist” means opposing agencies altogether, then even Justice Thomas — the Foreword’s *bête noire* — should not be included. Granted, Justice Thomas has argued that judges should decide legal questions *de novo*, only Congress can regulate coercively, and adjudication belongs in Article III courts.<sup>14</sup> But he seems to accept agency action *sometimes*.<sup>15</sup> The same is true for Philip Hamburger.<sup>16</sup> These are the two most aggressive critics discussed in the Foreword. There are also many other “anti-administrativists” who hold different views; as far as I can tell, no one is marching in lockstep on these issues. In fact, even progressive heroes have expressed distaste for aspects of administrative law. Justice Douglas, as pure a New Dealer as they come, dissented, for instance, from the Supreme Court’s evisceration of formal rulemaking.<sup>17</sup> Justice Jackson, another prominent New Dealer, attacked a key pillar of modern administrative law as “conscious lawlessness” and “administrative authoritarianism.”<sup>18</sup> And Justice Brennan, the liberal lion himself, sternly challenged non–Article III adjudication.<sup>19</sup>

<sup>11</sup> See, e.g., *id.* at 31–33.

<sup>12</sup> See *id.* at 66 n.391 (Friedrich Hayek). And the number is almost certainly greater. See, e.g., *All Prizes in Economic Sciences*, NOBELPRIZE.ORG, [https://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/](https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/) [<https://perma.cc/3A5L-NY6K>].

<sup>13</sup> See Metzger, *supra* note 1, at 33.

<sup>14</sup> See, e.g., Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J.F. 94, 94 (2015).

<sup>15</sup> See *id.* at 99–100. To provide just one recent example, see *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (approving of “the Patent Office[’s ability] to promulgate rules governing its own proceedings”).

<sup>16</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–4 (2014) (explaining that “many executive acts are entirely lawful,” including those granting or denying money, services, information, or other benefits).

<sup>17</sup> See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (Douglas, J., dissenting) (criticizing the Court’s “sharp break with traditional concepts of procedural due process”).

<sup>18</sup> *SEC. v. Chenery Corp.*, 332 U.S. 194, 216–17 (1947) (Jackson, J., dissenting); see also *id.* at 216 (criticizing the Court’s blessing of “the Commission’s assertion of power to govern the matter *without law*”).

<sup>19</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (plurality opinion) (urging that “the independence of the Judiciary be jealously guarded”); see also *CFTC v. Schor*,

All the while, what does it mean to be “committed to the administrative project?”<sup>20</sup> From the Foreword, we learn one can oppose *Chevron*<sup>21</sup> and still be committed.<sup>22</sup> The committed can also “criticize[] executive branch excesses” and attack “agency failures.”<sup>23</sup> One can even rush to court to challenge administrative action.<sup>24</sup> Nor does it appear that the Foreword’s attempt to draw lines is just a fancy way of saying there are political differences. After all, the Tenth Circuit’s decision<sup>25</sup> — lamented in the Foreword<sup>26</sup> — that struck down the Securities and Exchange Commission’s method for appointing administrative law judges was authored by a judge who had run for high political office as a Democrat earlier in his career, and who had been appointed to the bench by President Obama.<sup>27</sup> The en banc D.C. Circuit too split on that same question,<sup>28</sup> even though judges appointed by Democratic Presidents outnumber their colleagues appointed by Republican Presidents. And the proposed Regulatory Accountability Act,<sup>29</sup> also lamented by the Foreword, is prominently backed by “Senators Rob Portman of Ohio, a Republican, and Heidi Heitkamp of North Dakota, a Democrat.”<sup>30</sup>

To be sure, the Foreword offers a test. It says there are three defining qualities of anti-administrativism: (1) “a rhetorical and almost visceral resistance to an administrative government perceived to be running amok”; (2) a look “to the courts as the means to curb administrative power”; and (3) an objection against the administrative state that suggests it is “at odds with the basic constitutional structure and the original understanding of separation of powers.”<sup>31</sup> But this does not help. Consider prong one. The Foreword seems to treat Professor Cass Sunstein

478 U.S. 833, 859 (1986) (Brennan, J., dissenting) (similar).

<sup>20</sup> Metzger, *supra* note 1, at 33.

<sup>21</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>22</sup> See Metzger, *supra* note 1, at 33–34.

<sup>23</sup> *Id.* at 33.

<sup>24</sup> The Foreword says “many progressives are now turning to the courts to counter the Trump Administration’s regulatory rollbacks.” *Id.* at 34. Yet it also acknowledges that not everything challenged has been a “rollback.” See, e.g., *id.* at 11.

<sup>25</sup> *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) (Matheson, J.).

<sup>26</sup> See Metzger, *supra* note 1, at 20–21.

<sup>27</sup> See Lee Davidson, *Scott Matheson Jr. Senate Questionnaire Reveals Little-Known Facts*, DESERET NEWS (Mar. 27, 2010, 12:29 AM), <https://www.deseretnews.com/article/700019806/Scott-Matheson-Jr-Senate-questionnaire-reveals-little-known-facts.html> [<https://perma.cc/XP7X-9GUQ>].

<sup>28</sup> *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (mem.) (denying petition for review by an evenly divided en banc court).

<sup>29</sup> S. 951, 115th Cong. (2017); H.R. 5, 115th Cong. (2017).

<sup>30</sup> Cass R. Sunstein, Opinion, *A Regulatory Reform Bill that Everyone Should Like*, BLOOMBERG VIEW (June 22, 2017, 8:30 AM), <https://www.bloomberg.com/view/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like> [<https://perma.cc/6HHT-D8V5>]; see also *id.* (“Look! Bipartisanship is alive, and cranking out good ideas.”).

<sup>31</sup> Metzger, *supra* note 1, at 34.

as someone “committed” to the administrative state.<sup>32</sup> Yet he has criticized agencies for falling victim to “myopia, interest-group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion.”<sup>33</sup> Now consider prong two. Whatever one thinks of, say, the REINS Act,<sup>34</sup> its sponsors are not looking to the *courts* — they are looking to *Congress*. And as to prong three, remember again Justice Brennan and non–Article III adjudication. Presumably the Foreword includes Justice Brennan among the “committed,” but he thundered that “[t]he Framers knew that [t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>35</sup> *Tyranny*. That’s a strong word. By contrast, Justice Alito — a supposed anti-administrativist<sup>36</sup> — does not appear to share that view.<sup>37</sup> The Foreword’s test, in short, does not hold up.<sup>38</sup>

Two final examples help illustrate my confusion. First, I am listed as an “anti-administrativist.”<sup>39</sup> Why? It is not because I think there is no place for agencies.<sup>40</sup> Rather, it is because I have written that formal rulemaking — which has always been part of the APA<sup>41</sup> — merits greater experimentation due to the potential benefits of cross-examination. Yet I think cross-examination makes sense in the courtroom too.<sup>42</sup>

<sup>32</sup> See, e.g., *id.* at 3 (citing Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42–43).

<sup>33</sup> Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995). To be sure, perhaps Sunstein’s rhetoric is not “visceral” enough. Or perhaps he is an anti-administrativist too. He is, after all, on record “largely supporting” the Regulatory Accountability Act. Metzger, *supra* note 1, at 12 n.43 (citing Sunstein, *supra* note 30).

<sup>34</sup> Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

<sup>35</sup> *CFTC v. Schor*, 478 U.S. 833, 859–60 (1986) (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 46, at 334 (James Madison) (H. Dawson ed., 1876)). He was joined in full by Justice Marshall. *Id.* at 859.

<sup>36</sup> See, e.g., Metzger, *supra* note 1, at 3, 86 & n.515.

<sup>37</sup> See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (Alito, J., concurring in part and concurring in the judgment) (declining to second-guess *Schor*).

<sup>38</sup> In its footnotes, the Foreword also says “the shared network of lawyers, scholars, advocates, and funders” helping with legal challenges “and the parallels to claims raised against administrative government in the 1930s” help to distinguish true anti-administrativism. Metzger, *supra* note 1, at 34 n.197. Yet lawyers and the like find themselves on both sides of these issues. For instance, Neal Katyal, who is favorably cited, see Metzger, *supra* note 1, at 80 n.472 (citing Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006)), argued that giving preclusive effect to agency rather than judicial decisions may be unconstitutional. See Brief for Respondent at 37–42, *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015) (No. 13–352).

<sup>39</sup> See Metzger, *supra* note 1, at 32 n.181 (citing Nielson, *supra* note 7).

<sup>40</sup> Indeed, rigorous procedures can sometimes benefit agencies. See Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. (forthcoming 2018).

<sup>41</sup> See Administrative Procedure Act, ch. 324, §§ 7–8, 60 Stat. 237, 241–42 (1946).

<sup>42</sup> See Nielson, *supra* note 7, at 266–67.

Does that make me “anti-judiciary”? Perhaps it just means I’m pro-cross-examination. And second, the most cutting critique of administrative law in recent times aired on late-night TV, not in a judicial opinion, law review article, or political stump speech.<sup>43</sup> Why be concerned about being an anti-administrativist when even *Saturday Night Live* fits the definition?

## II. THE HISTORY OF ADMINISTRATIVE LAW IS RICH WITH LESSONS

The Foreword helpfully walks us through the 1930s and the body of administrative law that emerged. It then argues that the APA, enacted in 1946, “broadly legitimiz[ed] administrative governance,” even though, to be sure, the APA “constrained administrative practice in some respects.”<sup>44</sup> Building on that premise, the Foreword urges that calls for reform threaten the “order that has governed for the last eighty years.”<sup>45</sup>

This history is worth exploring and the Foreword makes many interesting points. Even so, I think it moves too quickly and misses important lessons. For instance, I am not sure the APA is a mere continuation of the 1930s rather than a break from it. After all, in the 1940s, the APA was attacked “as nothing short of a ‘sabotage of the administrative process’”<sup>46</sup> that would “severely cramp the style of government regulation.”<sup>47</sup> (It seems that *anti-anti-administrativists* sometimes use aggressive rhetoric too.) Likewise, cases like *Chenery I*<sup>48</sup> — arguably a forerunner of “hard look” review<sup>49</sup> — suggest that even the New Deal Supreme Court was not convinced that agencies can always police themselves. And by the 1940s, many recognized that James Landis’s vision of “expertness” was more than a little naïve.<sup>50</sup>

Leave all of that aside, however. There is another complication: history did not end in 1946. True, the Supreme Court has said that “the

<sup>43</sup> See *Saturday Night Live: How a Bill Does Not Become a Law* (NBC television broadcast Nov. 22, 2014), <http://www.nbc.com/saturday-night-live/video/capitol-hill-cold-open/2830152>.

<sup>44</sup> Metzger, *supra* note 1, at 62.

<sup>45</sup> *Id.* at 64.

<sup>46</sup> Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 90 (2008) (citing Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946)).

<sup>47</sup> *Id.* (quoting Fritz Morstein Marx, *Some Aspects of Legal Work in Administrative Agencies*, 96 U. PA. L. REV. 354, 354 n.2 (1948)).

<sup>48</sup> SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

<sup>49</sup> See, e.g., Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526 (1985) (“The origins of the hard look doctrine can be traced to the Supreme Court’s holding in *SEC v. Chenery Corp.*”).

<sup>50</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001) (rejecting the Landis theory as “almost quaint” because agency decisions obviously “involve value choices” and noting that “even then it provoked strong opposition”).

APA ‘settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.’<sup>51</sup> But the way administrative law works today often does not use the same “formula” upon which compromise was reached.<sup>52</sup> Of course, the *vocabulary* is often the same; we still speak of “rule making” and “adjudication.”<sup>53</sup> And *Bowles v. Seminole Rock & Sand Co.*<sup>54</sup> — the source of the idea that agencies should receive deference when interpreting their own decisions — comes from that era. Moving beyond labels, however, the world of administrative law today can be very different from that of 1946. Thus, it is a mistake to suggest that today’s criticisms somehow challenge the last “eighty years” of administrative law, as if we are simply replaying the 1930s, or less aggressively, to argue that the pattern of the 1930s necessarily provides a good parallel to today. Instead, because administrative law has continued to evolve, new challenges have emerged and more intense pressure has been placed on old compromises.

I’ve taken a stab at my own history of the evolution of administrative law and will not repeat it here.<sup>55</sup> A few points, however, bear mentioning. Consider first the *structural* framework of administrative law.<sup>56</sup> For example, although the Foreword is correct that the APA blesses rulemaking, the nature of rulemaking has changed significantly since 1946: rulemaking today is a bigger part of administrative law and is used for much more transformational policies.<sup>57</sup> Likewise, informal rulemaking has seemingly overgrown the APA’s fence. In 1946, use of formal rulemaking, complete with robust procedural protections, was anticipated to be significant.<sup>58</sup> The Supreme Court, however, essentially banished formal rulemaking in 1973<sup>59</sup> — in a decision that Judge Friendly and others have questioned.<sup>60</sup> The nature of deference has also changed. To be sure, *Seminole Rock* was decided before the APA was

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<sup>51</sup> Metzger, *supra* note 1, at 62 (alterations in original) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

<sup>52</sup> See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014); Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, Essay, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015).

<sup>53</sup> See 5 U.S.C. §§ 553–554, 556–557 (2012).

<sup>54</sup> 325 U.S. 410 (1945).

<sup>55</sup> See Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757 (2015).

<sup>56</sup> Some describe this as the basis for “administrative constitutionalism.” See, e.g., Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1899–900 (2013).

<sup>57</sup> See, e.g., Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1140 (2001).

<sup>58</sup> See Nielson, *supra* note 7, at 246.

<sup>59</sup> See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973).

<sup>60</sup> See Nielson, *supra* note 7, at 253 (citing, inter alia, Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1309 (1975)); see also Kent Barnett, Essay, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017).

enacted. But at the time it was a narrow doctrine with significant limits.<sup>61</sup> It was not until decades later that the modern, less restrained version emerged.<sup>62</sup> Along similar lines, it is hard to argue that *Chevron* was compelled by 1940s precedent,<sup>63</sup> and, in any event, the way *Chevron* is used arguably has changed even since 1984. Judge Silberman, one of *Chevron*'s early champions,<sup>64</sup> seems to think so. He recently explained that because courts have been more lackadaisical about step two than *Chevron* itself called for, agencies now "exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion."<sup>65</sup>

The *internal* culture and operations of the administrative state have also changed. As then-Professor Elena Kagan noted, Presidents, for instance, have increasingly turned to administrative action rather than legislation for domestic policy.<sup>66</sup> Agencies nowadays also can be quite strategic,<sup>67</sup> a trend that may only increase in the face of congressional opposition to aggressive agency actions.<sup>68</sup> And beyond what is happening in beltway politics, other broad social changes also have implications for the internal world of administrative law. Agency officials, for instance, may face new pressures because the nature of the global marketplace has evolved since the 1940s.<sup>69</sup> Indeed, as society changes for *whatever* reason, the pressures put on administrative law almost inevitably change too.

This is not a complete list of all that has happened since 1946, but hopefully it makes the point: things are different. And because not everything has worked out as rosilily as the optimists in the 1940s hoped, today's anti-administrativists are not chasing boogeymen. Instead, anti-administrativists generally are responding to the real challenges of an evolving administrative state.

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<sup>61</sup> See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 52–53 (2015).

<sup>62</sup> See *id.* at 53.

<sup>63</sup> See Metzger, *supra* note 1, at 61 n.362 (citing Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 978–81 (2017)).

<sup>64</sup> See Laurence H. Silberman, *Chevron* — *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990).

<sup>65</sup> *Global Tel\*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

<sup>66</sup> See Kagan, *supra* note 50, at 2248.

<sup>67</sup> See Nielson, *supra* note 7, at 267.

<sup>68</sup> See, e.g., Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

<sup>69</sup> See, e.g., Nielson, *supra* note 55, at 805–14.

### III. ANOTHER TAKE ON THE SUPREME COURT AND CONGRESS

With this view of history in mind, reread the Foreword’s assessment of today’s Supreme Court. Why are the anti-administrativist Justices (in other words, *all* Justices, at least sometimes) concerned about administrative law? It is not because they long for the nineteenth century. Instead, it is because the “compromise” of 1946 often no longer reflects how things work. At the same time, the Justices are confronting today’s reality in a familiar way: the Court’s opinions suggest respect for *stare decisis* but also recognition that “a precedent is not always expanded to the limit of its logic.”<sup>70</sup> Looking at the last decade or so of cases, it appears that the Justices hope to prevent the extension of certain cases but are hesitant to overrule precedent.

To see this dynamic in action, I recommend a close reading of Chief Justice Roberts’s opinions, with particular focus on his *City of Arlington*<sup>71</sup> dissent<sup>72</sup> — especially because that dissent was joined in full by Justices Kennedy and Alito, and Justices Thomas and Gorsuch may be sympathetic to it. The Foreword is right that the Chief Justice used sharp rhetoric in this opinion about many aspects of administrative law.<sup>73</sup> But in fairness to the Chief Justice, his concerns are not frivolous, especially when one recalls (as the Chief Justice reminded us in another opinion) that the Constitution “is concerned with means as well as ends.”<sup>74</sup> The Chief Justice’s main point seems to be that “*effective*” government<sup>75</sup> may not always be *lawful* government — “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.”<sup>76</sup> And it is

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<sup>70</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007).

<sup>71</sup> 569 U.S. 290 (2013).

<sup>72</sup> *Id.* at 312 (Roberts, C.J., dissenting).

<sup>73</sup> Metzger, *supra* note 1, at 36. In his dissent, which addressed whether *Chevron* extends to jurisdictional questions, the Chief Justice argued that agencies appear to exercise legislative power: “[T]he citizen confronting thousands of pages of regulations — promulgated by an agency directed by Congress to regulate, say, ‘in the public interest’ — can perhaps be excused for thinking that it is the agency really doing the legislating.” *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting). Agencies, he argued, also appear to exercise judicial power “by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.” *Id.* at 312–13. And he worried that agency independence may hinder a President’s ability “to keep federal officers accountable.” *Id.* at 313. Against that backdrop, the Chief Justice observed that “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.” *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

<sup>74</sup> *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428 (2015) (Roberts, C.J.).

<sup>75</sup> Metzger, *supra* note 1, at 85 (emphasis added). Of course, one cannot measure effectiveness without asking, “Effective at what?” Different forms of government serve different purposes.

<sup>76</sup> *Horne*, 135 S. Ct. at 2428 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

not “political” for the judiciary to recognize this; indeed, biting one’s tongue can itself be political.

Yet the Foreword is correct that this strong rhetoric has not been paired with equally strong decisions.<sup>77</sup> The Court has not taken a wrecking ball to anything. Rather than striking down laws as violating the nondelegation doctrine, for instance, the Court construes statutes narrowly<sup>78</sup> and sometimes appears reluctant to infer a delegation.<sup>79</sup> Similarly, rather than eliminating non–Article III adjudication, the Court, more modestly, has clarified that there are meaningful limits on it.<sup>80</sup> And although the logic of *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>81</sup> may cast doubt on agency independence altogether,<sup>82</sup> the Court did not take its judgment anywhere near that far. Similarly, even if the Court eventually overrules *Seminole Rock*, the Justices likely will replace it with something like *Skidmore* deference — which is probably how *Seminole Rock* was originally understood anyway.<sup>83</sup> In other words, the Court uses strong language but does not appear inclined to rethink everything.

Why not? Might it be because the Court respects precedent? As I read the cases, 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. This process sometimes requires considering constitutional first principles to answer the legal questions. Yet it is not the Justices’ fault that “our administrative law is inextricably bound up with constitutional law.”<sup>84</sup>

If I am correct that the Court is concerned about both agency overreach and *stare decisis*, then strong rhetoric makes a great deal of sense. The Court does not want its decisions *upholding* precedent to be mis-

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<sup>77</sup> See Metzger, *supra* note 1, at 3.

<sup>78</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (explaining how the Court reads statutes narrowly to avoid nondelegation problems).

<sup>79</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (refusing to apply *Chevron* where the policy implications of the potential ambiguity are significant).

<sup>80</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462, 493–94 (2011) (retaining but reading narrowly, *inter alia*, *CFTC v. Schor*, 478 U.S. 833 (1986), and *Crowell v. Benson*, 285 U.S. 22 (1932)).

<sup>81</sup> 561 U.S. 477 (2010).

<sup>82</sup> See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541, 2569–75 (2011).

<sup>83</sup> See, e.g., Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, *GEO. J.L. & PUB. POL’Y* (forthcoming), <https://ssrn.com/abstract=2993473> [<https://perma.cc/PW3F-PPQH>]. Sometimes it makes sense to overrule cases. Indeed, the law of *stare decisis* itself allows overruling if there is a good reason for it. Thus, if the Court determines that some of its administrative law cases need to be revisited outright or trimmed in some applications, doing so would not necessarily offend the judicial process.

<sup>84</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 *U. PA. L. REV.* 614, 618 (1927).

understood as licenses to *expand* precedent. This might also explain why the Court seems hesitant to allow agency-empowering innovation.<sup>85</sup> Because agencies already have long leashes, the Court may worry about blessing even more discretion, especially because the Court itself has acknowledged for decades that agencies are not always angelic.<sup>86</sup> And does anyone doubt that aspects of administrative law *can* be threatening to liberty<sup>87</sup> and even sometimes unconstitutional?<sup>88</sup>

Along similar lines, a quick word about Congress is also warranted. The Foreword’s most provocative claim is that because delegation is so rampant in the modern world, perhaps the administrative state comes with it.<sup>89</sup> But the Foreword also — surprisingly — expresses concern about Congress’s proposed measures to take back some of the authority it has delegated.<sup>90</sup> Yet if, in fact, the price of delegation is the administrative state and, if, in fact, Congress is unhappy with aspects of the administrative state, then wouldn’t it be logical on the Foreword’s own terms for Congress to decide that there is too much delegation and do something about it? Or at least to *experiment* to see if things can be improved?<sup>91</sup> The Foreword also acknowledges that some checks and balances are necessary.<sup>92</sup> But if Congress believes that today’s checks and balances are not enough, why not add more? And why wouldn’t members of Congress sometimes use rhetoric to make their points, especially for a subject as important as checks and balances? None of this is to say that there are easy answers when it comes to the *specifics* of what administrative law ought to look like. But conceptually, congressional action should not be unthinkable, especially because society and administrative law are anything but static.

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<sup>85</sup> See, e.g., Metzger, *supra* note 1, at 18–19.

<sup>86</sup> See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (“[E]xpertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.” (internal quotations omitted)).

<sup>87</sup> See, e.g., *True the Vote, Inc. v. IRS*, 831 F.3d 551, 562 (D.C. Cir. 2016) (“Parallel to Joseph Heller’s catch, the IRS is telling the applicants in these cases that ‘we have been violating your rights and not properly processing your applications. You are entitled to have your applications processed. But if you ask for that processing by way of a lawsuit, then you can’t have it.’ We would advise the IRS: if you haven’t ceased to violate the rights of the taxpayers, then there is no cessation. You have not carried your burden, be it heavy or light.”).

<sup>88</sup> The Foreword does not contain a great deal of case analysis about every topic. But is it fair to ask whether, say, Justice Alito is *wrong* about the arbitration provision in *Amtrak*? Using traditional legal tools, doesn’t he make a pretty good case? See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1239 (2015) (Alito, J., concurring). The same is true for the Tenth Circuit’s Appointments Clause analysis. See *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016). Of course, these opinions might be wrong, but the Foreword has not demonstrated it.

<sup>89</sup> See Metzger, *supra* note 1, at 87–88.

<sup>90</sup> See *id.* at 11–13 (criticizing proposed legislation).

<sup>91</sup> See, e.g., Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008).

<sup>92</sup> Metzger, *supra* note 1, at 91.

## IV. PREPARING FOR THE FUTURE OF ADMINISTRATIVE LAW

Finally, the Foreword is right that change is coming. Even today, there may be five votes for something like the Chief Justice's *City of Arlington* dissent, at least when it comes to imposing more context-specific limits on *Chevron*.<sup>93</sup> Congress also may be poised to enact regulatory reform. The question administrative law scholars should ask is how to respond.

There are at least two options. One is to resist. The other is to search for common ground. I urge the latter option. Because administrative law is complex, there are many ideas, some better and some worse — and all needing further thinking. Hopefully then, reform can be a collaborative effort in which all ideas are carefully considered as we move beyond old battle lines. This does not mean everyone will magically agree about everything. But it does mean we can still work together to try achieve the best balance of risk and reward that the law allows.

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At base, the Foreword asks a simple question: agencies do many good things, so why can't we learn to stop worrying and love the administrative state? And here is the answer: true, agencies do many good things, but they also sometimes do bad things, and they would do even more bad things in a world without "consequence[s]."<sup>94</sup> This need for both energetic government *and* safeguards on it drives much of the concern about today's administrative law, just as it helped drive the APA's creation and the Constitution's. Because I think there is a place for agencies but also that administrative law can be improved, I confess: I'm an "anti-administrativist." And you should be too.

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<sup>93</sup> See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1425 (2017).

<sup>94</sup> *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652–53 (2015).