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## A BUREAUCRACY — IF YOU CAN KEEP IT<sup>†</sup>

*Mila Sohoni*<sup>\*</sup>

In her Foreword,<sup>1</sup> Professor Gillian Metzger portrays the administrative state as laid under siege by an array of judicial, political, and academic attackers. Expertly curating and deftly dissecting a century’s circus of intellectual debate and political conflict, the Foreword demonstrates the myriad ways in which today’s struggles over administrative government reprise the turmoil of the New Deal period.

Indeed, the parallels between the present moment and the 1930s may extend further than she draws them. The history of that era suggests how the “rhetorical antipathy”<sup>2</sup> towards the administrative state that Metzger carefully documents and critiques may yet cross over from the realm of rhetoric to the realm of reality. That, of course, only makes it that much more urgent to answer the central question addressed by the Foreword — the question of how to respond to the “anti-administrativist”<sup>3</sup> complaint that the federal bureaucracy is extralegal, unconstitutional, and tyrannical.

Metzger’s response is the provocative rejoinder that the administrative state is not merely constitutionally permissible and not merely constitutionally beneficial, but also constitutionally *obligatory*.<sup>4</sup> This argument diverges in critical respects from long-held conceptions of the administrative state’s constitutional status and role. It is bold in its premises and startling in its possible implications. It aims to break the siege — to quell, at once and en masse, the renascent attacks upon administrative government. But her argument for a constitutional obligation of administrative government pivots upon the threshold assumption that the Supreme Court will continue to regard broad delegations as constitutionally permissible — a point about which I do not feel as sanguine. And even if delegation doctrine persists in its present form, the full contours of the contingent constitutional obligation posited by Metzger seem to me to be both potentially enormous and — at the same time — hard to trace with precision. At the brass-tacks level,

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

<sup>\*</sup> Professor of Law, University of San Diego School of Law. Many thanks to Adam Cox, Chris Egleson, Richard Fallon, Daryl Levinson, David Pozen, and Adam Zimmerman for helpful comments and conversations, and to the editors of the *Harvard Law Review* for their excellent editorial work.

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

<sup>2</sup> *Id.* at 34.

<sup>3</sup> *Id.* at 4 (defining “anti-administrativism”).

<sup>4</sup> *Id.* at 87–95.

it is difficult to map out what exactly honoring the constitutional obligation of administrative government would require in the many and varied contexts in which it might be pitted against countervailing targeted arguments that regulatory power ought to be restrained. Politicians, scholars, lawyers, and judges gave us the modern administrative state; whether we can keep it remains to be seen.

## I. RHETORIC AND REALITY

Metzger situates the current mood of anti-administrativism in its early twentieth-century roots, in the struggle over the New Deal.<sup>5</sup> During the 1930s, the constitutionality of the burgeoning administrative state was hotly contested, in particular by the Liberty League, a coalition of businesses funded by the du Pont brothers.<sup>6</sup> The landslide 1936 reelection of President Franklin Delano Roosevelt, the unpopularity of the League, and the Court's change of constitutional course at the close of the 1930s ended that fight for a time.<sup>7</sup> But that hiatus is now over. Politicians are now launching multipronged campaigns against the apparatus of administrative government, while an accumulating mass of academic writing challenges the constitutionality of fundamental features of the regulatory state.<sup>8</sup> Perhaps most importantly, the Justices seem to be reentering the fray too. Today, flights of "rhetorical excess[]"<sup>9</sup> and "strong rhetorical condemnation of administrative government"<sup>10</sup> have featured in concurring or dissenting opinions by no fewer than four members of the current Court.<sup>11</sup>

What should we make of such judicial opinions "decry[ing] the dangers of the ever-expanding administrative state,"<sup>12</sup> when — as

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<sup>5</sup> *Id.* at 6 ("[T]he real forebears . . . are . . . the conservative opponents of an expanding national bureaucracy in the 1930s.").

<sup>6</sup> *Id.* at 53–56.

<sup>7</sup> *Id.* at 63 ("The 1930s represent the first and the last time that the national administrative government was subject to the type of sustained constitutional challenge that we are seeing today.").

<sup>8</sup> *Id.* at 9–17; 31–33. This uptick in anti-administrativist attacks is surely linked to the more general — and also increasingly prevalent — notion that America suffers from the malady of "too much law," whether statutory or regulatory. For an examination and critique of various incarnations of that claim, see generally Mila Sohoni, *The Idea of "Too Much Law,"* 80 *FORDHAM L. REV.* 1585 (2012).

<sup>9</sup> Metzger, *supra* note 1, at 35.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 3 ("Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, they have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional."); see *id.* at 8–9; *id.* at 63 ("[M]any of the current constitutional attacks are made in terms nearly identical to those used by the League, and the League's anti-administrative rhetoric rivals that of some members of the Roberts Court.").

<sup>12</sup> *Id.* at 6.

Metzger stresses — their “bottom-line impact does not match their polarizing rhetoric”?<sup>13</sup> Such opinions seem to bash the bureaucracy for no evident “practical gain”;<sup>14</sup> but does that fully capture what these opinions may signify?

Like Metzger, I believe that much light can be cast on our present situation by looking back to the landmark battles between progressive and conservative Justices in the early part of the twentieth century.<sup>15</sup> The dissenters of that period — Justice Holmes chief among them — famously argued that the extant jurisprudence of the *Lochner* era<sup>16</sup> was anachronistic, unprincipled, and illegitimate. In opinions that set the bar for future dissents, they systematically hacked away at the philosophical underpinnings of that era’s jurisprudence,<sup>17</sup> whilst also writing extramurally so as to leave no doubt as to their discontents.<sup>18</sup> These Justices may not always have been consistent,<sup>19</sup> and they may not always have been correct.<sup>20</sup> But what they most certainly *were* was in deadly earnest.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 95 (“Repeatedly voicing [anti-administrativist] claims threatens the administrative state’s legitimacy for little practical gain and risks further politicizing the Court.”); *id.* at 50 (“But the constant repetition of this motif [of the administrative state’s unconstitutionality], combined with the Court’s rhetorical invocations of liberty-threatening bureaucrats, undermines the administrative state’s sociological and moral legitimacy as well.”); *id.* at 44 (“[F]ew Justices seem willing to embrace the rollback in national administrative government that the posited antimony of separation of powers and contemporary national administrative government would seem to entail.”); *id.* at 47 (“[G]ood reasons exist to conclude that few of these more radical political moves will come to pass. So far the judicial bark has been fiercer than its bite . . .”).

<sup>15</sup> See Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1175, 1217–25 (2013) (explaining how recent debates between the Justices on the modern Court reprise New Deal-era debates concerning the constitutional doctrine of due process notice).

<sup>16</sup> I use the term the “*Lochner* era” roughly, to denote the period between the end of the nineteenth century and the end of the 1930s. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1344 (2000). Scholars have long disagreed on when precisely the *Lochner* era began and ended. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 105 (1998) (“The empire of substantive due process was already in a state of collapse when the [*West Coast Hotel v. Parrish* decision [in 1937] officially lowered the flag over its last colony.”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 n.64 (1987) (defining the *Lochner* era as “roughly” the years “between 1905 and 1937”).

<sup>17</sup> See, e.g., *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

<sup>18</sup> See, e.g., Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

<sup>19</sup> Compare, e.g., *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (pointing out that “school laws” show that the idea that the “liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same” is a “shibboleth”), with *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (invalidating under the Due Process Clause, with no dissent from Justice Holmes, a law requiring that children be sent to public schools).

<sup>20</sup> See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.).

Today's dissenters<sup>21</sup> should be seen as the mirror image and foil of those *Lochner*-era dissenters, who toiled so long and so assiduously until their point was won by a later and more fatal majority. That today's Justices have not fully embraced every logical consequence of their views does not mean they do not hold the views.<sup>22</sup> The litigants' arguments and the rationales reached by the lower courts may hem in what a particular Justice deems proper to say in a given case. The modern dissenters, in other words, are applying their principles in the context of particular cases, and they are embracing the logical consequences of their views to the extent they feel it appropriate to do so as a matter of judicial craft.<sup>23</sup> On top of that, anti-administrativist opinions play other important roles. For one, they send signals to litigants, who then bring lawsuits that *do* place more fundamental questions squarely at issue, and to judges on lower courts, who may then start to "percolate" particular questions more aggressively.<sup>24</sup> For another, on those occasions when an anti-administrativist opinion *is* able to com-

<sup>21</sup> I say "dissenters" here to capture the thrust of their sentiments, but some of the anti-administrativist opinions are technically concurrences.

<sup>22</sup> Cf. Metzger, *supra* note 1, at 36 (noting, with respect to Chief Justice Roberts's critical statements about administrative power in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting), that "[t]he logical inference from such language is that modern administrative government is systematically unconstitutional, yet all the Chief Justice sought was an exclusion of jurisdictional determinations from the ambit of *Chevron* deference").

<sup>23</sup> Metzger underscores that today's judicial anti-administrativists save the bulk of their "rhetorical concerns about executive power spinning out of control or being exercised at odds with the constitutional structure" for the "domestic and administrative contexts," *id.* at 37, while often accepting very broad claims of executive power in the arenas of foreign relations and national security. *Id.* at 37–38. Indeed, it was ever thus. *Lochner*-era jurisprudence shows that authentic judicial anti-administrativism in domestic policy can coexist with a deeply deferential stance towards executive branch authority in the foreign relations realm. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 34 (2000) ("The Supreme Court's extension of federal power in foreign affairs took place at the same time that a Court majority was resisting extensions of federal power in the domestic arena. The principal early twentieth-century architect of a rationale for extensive federal foreign relations power, Justice George Sutherland, has typically been described as an opponent of the New Deal and rejected several pieces of New Deal domestic legislation on constitutional grounds.").

<sup>24</sup> See Elbert Lin, *At the Front of the Train: Justice Thomas Reexamines the Administrative State*, 127 *YALE L.J.F.* 182, 192–94 (2017) (noting that a "likely effect" of Justice Thomas's opinions is "a change in the way litigants approach cases involving agency action," *id.* at 194, and that another "likely effect" is that "lower court judges may feel empowered to develop the conversation [about how to rethink administrative law] further in their own separate writings," *id.* at 193). From the Court's expression of doubts about the constitutionality of agency adjudication in *Stern v. Marshall*, 564 U.S. 462, 494–95 (2011), we can draw a line to the circuit split concerning the constitutionality of SEC administrative adjudication, as well as to the Court's grant of certiorari in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017) (mem.) (granting certiorari). See Metzger, *supra* note 1, at 21–22; see also Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 *NW. U. L. REV.* 1569, 1594 n.143 (2013) ("One might also see in *Stern* an indication that some members of the Supreme Court believe that the public rights exception has been too broadly drawn and that agency adjudication involving private rights is vulnerable to Article III challenge.").

mand a majority — perhaps precisely *because* of its modest “bottom-line impact”<sup>25</sup> — then that opinion may begin the process of a death by a thousand cuts, which is a time-honored way to kill off a disfavored doctrine.<sup>26</sup>

There is not much in any of this to reassure supporters of administrative government. Conversely, to opponents of administrative government, the timeline of the decline of *Lochner*-era jurisprudence might teach the lessons of patience, resolve, and staying the course. When one begins the work of undermining an entire body of jurisprudential thought, one may not live to see the whole thing come crashing down.<sup>27</sup>

Viewed in this historical light, the Roberts Court’s recent expressions of judicial anti-administrativism may appear less a rhetorical threat — and more a real one — than their immediate lack of a “bottom-line impact” would otherwise indicate. Viewed in the light of the present day, two additional factors external to the Court may give added impetus to the Justices’ anti-administrativist impulses. For one, this happens to be a time when many (more) Americans are experiencing an instinctive or “almost visceral”<sup>28</sup> resistance to claims to strong executive branch power. President Trump’s Administration may prove to be a great boon to those who would portray the administrative state as tyrannical,<sup>29</sup> unaccountable,<sup>30</sup> unconcerned with individual rights,<sup>31</sup>

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<sup>25</sup> Metzger, *supra* note 1, at 7.

<sup>26</sup> Consider *King v. Burwell*, 135 S. Ct. 2480 (2015). The Court’s opinion did not make a frontal attack on *Chevron* deference; instead, merely by invoking the major questions exception to *Chevron* deference, *id.* at 2489, the opinion may destabilize that doctrine by expanding that exception’s scope. See, e.g., *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam); see also Metzger, *supra* note 1, at 26–27 (noting that *King* is an instance of “a more modest attack on *Chevron*,” *id.* at 26); Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1098–105 (2016).

<sup>27</sup> See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (setting out, at the dawn of the *Lochner* era, the framework for judicial deference that would ultimately become modern rational basis review).

<sup>28</sup> Cf. Metzger, *supra* note 1, at 34 (noting that a “theme” of anti-administrativism is a “rhetorical and almost visceral resistance to an administrative government perceived to be running amok”).

<sup>29</sup> See, e.g., Sarah Stillman, *The Mothers Being Deported By Trump*, NEW YORKER (July 22, 2017), <https://www.newyorker.com/news/news-desk/the-mothers-being-deported-by-trump> [<https://perma.cc/68GB-LPQ2>] (describing the evolution of immigration enforcement under Trump and how this evolution threatened with deportation many individuals “for whom public-safety justifications for removal don’t apply”).

<sup>30</sup> See, e.g., Rebecca Ballhaus, *Ethics Watchdog Declines White House Request to Suspend Lobbying Inquiry*, WALL ST. J., May 23, 2017.

<sup>31</sup> See, e.g., *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 589 (4th Cir.) (en banc), *vacated*, 2017 WL 4518553 (U.S. Oct. 10, 2017) (mem.); *id.* at 628 (Wynn., J., concurring) (stating that an executive order issued by President Trump “was likely borne of the President’s animus against Muslims and his intent to rely on national origin as a proxy to give effect to that animus”); Press Release, Palm Ctr., Fifty-

or capable of destroying Congress's handiwork.<sup>32</sup> Some of the underlying themes of anti-administrativism, if not all of its precise recommendations, may find voice on the left as well as on the right. For another, the currently sitting President may not prove to be very effective at accomplishing the project of sweeping regulatory reform to which he has committed. Earlier Presidents have signally failed at that task.<sup>33</sup> While one might construe that failure as a symptom of the absence of an underlying widespread political resolve to "deconstruct[] . . . the administrative state,"<sup>34</sup> a President's unwillingness (or inability<sup>35</sup>) to translate anti-administrativist rhetoric into reality may just deepen some anti-administrativists' conviction that the administrative state cannot be politically "tamed"<sup>36</sup> and that a constitutional remedy from the bench is therefore required. Either or both of these dynamics might tend to push judicial anti-administrativism out of the periphery of concurrence and dissent and onto the main stage.

If, however, Metzger carries the day with her most intriguing claim — that the administrative state is constitutionally *obligatory* — then all these quickening crosscurrents of judicial anti-administrativist sentiment, whether rhetorical or sincere, won't matter much; the Constitution, if it is understood as Metzger argues it ought to be, will curb and contain what anti-administrativists can accomplish.

## II. THE ADMINISTRATIVE STATE'S CONNECTION TO THE CONSTITUTION

In order to understand Metzger's constitutional argument, it is useful to begin by identifying how her account departs from another idea that connects the administrative state with constitutional law — the

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Six Retired Generals and Admirals Warn that President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness (Aug. 1, 2017), <http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness/> [https://perma.cc/PS5H-3EHQ].

<sup>32</sup> See, e.g., Haeyoun Park & Margot Sanger-Katz, *Four Ways Trump Is Weakening Obamacare, Even After Repeal Plan's Failure*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/07/19/us/what-trump-can-do-to-let-obamacare-fail.html> (last updated Sept. 27, 2017) [https://perma.cc/R2K5-R9RD].

<sup>33</sup> Metzger, *supra* note 1, at 14–17.

<sup>34</sup> See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight For "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [https://perma.cc/7KTJ-QPTJ].

<sup>35</sup> Metzger, *supra* note 1, at 16 (noting that "[m]any government programs are popular or lobbied for by well-connected interest groups").

<sup>36</sup> Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016).

idea of the “administrative constitution.”<sup>37</sup> The basic notion of the “administrative constitution” is that core aspects of administrative law — including the Administrative Procedure Act<sup>38</sup> (APA), the key precedents and conventions that shape agency action, and other transsubstantive doctrines and rules such as open-government laws and presumptions of judicial review of agency action — have come to supply the administrative state with an internal structure and a framework of control that operate essentially as a constitution for regulatory government.<sup>39</sup> By “legitimizing, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable,”<sup>40</sup> the administrative constitution performs the function of an “unwritten”<sup>41</sup> or quasi-constitution for the regulatory state.<sup>42</sup>

The important thing to remember about this type of quasi-constitutional law is that the chief answer to the questions “Where does the administrative constitution come from? Who made it?” is Congress.<sup>43</sup> The administrative constitution is akin to the kind of quasi-constitutional law most famously presented by Professors William Eskridge and John Ferejohn in their book, *A Republic of Statutes*,<sup>44</sup> which explains how framework or “super-statutes,” elaborated by courts and agencies, have come to play a constitutive role in the fabric of American law and government despite the fact that the

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<sup>37</sup> See Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 931–43 (2016).

<sup>38</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

<sup>39</sup> See Sohoni, *supra* note 37, at 931–43; see also Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (noting the “obvious” fact that “the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process”).

<sup>40</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671 (1975).

<sup>41</sup> See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1221 (2014).

<sup>42</sup> Even some of its critics see it as such. See, e.g., DeMuth, *supra* note 36, at 121 (“But administrative law is nonetheless positive law, with highly developed procedures, precedents, doctrines, and institutions for crafting and enforcing its commands. Indeed it has come to operate as a sort of shadow constitution, channeling the actions of Article I legislators, Article II executives, and Article III judges and calibrating the balance of power among the three branches.”).

<sup>43</sup> Certain features of the administrative constitution, such as requirements of internal separation of functions within agencies, are shaped by due process doctrines. Sohoni, *supra* note 37, at 939–40.

<sup>44</sup> WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010). Ferejohn and Eskridge only lightly touch on the APA, but Professor Kathryn Kovacs has subsequently written what one might think of as that missing chapter by explaining the APA’s claim to super-statute status. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2014).

statutes are not embodied in the text of the Constitution.<sup>45</sup> The administrative constitution is rooted in the enactment of such statutes — most importantly the APA<sup>46</sup> — and in the meaning and conventions encrusted around those statutes by agency practice and judicial elaboration, including by watershed holdings such as *Chevron*<sup>47</sup> and *State Farm*.<sup>48</sup> Needless to say, the administrative constitution is nowhere codified as such, nor is it “formally entrenched against change.”<sup>49</sup> But rather than rendering it vulnerable, those very features have seemed to make the administrative constitution that much more resilient and adaptable.<sup>50</sup>

The notion of the administrative constitution has been a helpful organizing framework. But the fragility of that model has become increasingly evident. For one thing, it leaves the administrative state vulnerable to shifting political coalitions and erosion of legislative support for administrative government. If Congress made the administrative constitution, then Congress can break it.<sup>51</sup> For another thing, the now-evident permeability of the administrative constitution has made it seem not as robust a framework as it was long assumed to be. The administrative constitution is riddled with “outs” and “loopholes.”<sup>52</sup> Many techniques — including waiver, delay, nonenforcement, and dealmaking — allow the executive branch to *lawfully* avoid the constraints of the administrative constitution, to act unilaterally, without advance public input and without judicial review, even though the resulting policies affect millions of people.<sup>53</sup> The growth of OIRA review — an executive branch procedural innovation<sup>54</sup> — has made it harder to credit the notion that Congress is the ultimate steward of important administrative procedure.<sup>55</sup> And Congress itself has tinkered with the ground rules at times, by enacting on an ad hoc basis broadly worded preclusions of judicial review to insulate consequential

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<sup>45</sup> ESKRIDGE & FERREJOHN, *supra* note 44, at 183–88; *see also* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

<sup>46</sup> Sohoni, *supra* note 37, at 936–38; Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015).

<sup>47</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>48</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>49</sup> Sohoni, *supra* note 37, at 933; *see also* Bremer, *supra* note 41, at 1233–34.

<sup>50</sup> Bremer, *supra* note 41, at 1233.

<sup>51</sup> *Id.*

<sup>52</sup> Sohoni, *supra* note 37, at 943–44, 963 (citing Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1273 (2010)).

<sup>53</sup> *Id.* at 944–63.

<sup>54</sup> Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1183 (2014) (“[M]ost of OIRA’s operation is entirely a creature of administrative fiat. It is anomalous that such an important feature of the regulatory state has no statutory basis.”).

<sup>55</sup> *See id.* at 1140, 1164–67.



executive branch policymaking from being examined by courts.<sup>56</sup> As unconventional uses of administrative power have expanded in scope and consequence, the exceptions to the administrative constitution have seemed to swallow the rule;<sup>57</sup> ordinary administrative law seems to have become a “lost world.”<sup>58</sup> In short, because the administrative constitution has come to appear both politically vulnerable and outmoded by administrative practice, its utility as an organizing framework has seemed increasingly questionable.

By breaking with this framework, Metzger’s account might offer remedies for these worries. She derives the backbone of the constitutional case for the administrative state from Article II as well as Article I. Her emphasis is upon how the Constitution secures the executive branch’s capacity to govern in an effective and accountable way, not just upon how the Constitution constrains administrative government.<sup>59</sup>

With this one stroke, Metzger’s account would counter both frailties of the model of the administrative constitution. First, by anchoring the administrative state to the executive branch instead of only to Congress, Metzger’s account would help to shield the administrative state against swings in support in Congress for administrative government. If the administrative state is “constitutionally mandated,”<sup>60</sup> if it is the “constitutional string” attached to delegation,<sup>61</sup> then Congress may *make* administrative power as an initial matter — by delegating — but it might not then be able to *unmake* it — by withdrawing or cabining the personnel and resources that the executive branch requires to carry that delegation out.<sup>62</sup>

Second, Metzger’s account might rationalize the more exotic variations of administrative power that the model of the administrative constitution has struggled to defend. Indeed, Metzger’s account —

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<sup>56</sup> See Sohoni, *supra* note 37, at 961, 970–71.

<sup>57</sup> *Id.* at 963–64.

<sup>58</sup> Farber & O’Connell, *supra* note 54, at 1177 (“The changing realities of administrative law have left behind the mechanisms that the APA and the courts have drafted to achieve these [rule of law] values.”).

<sup>59</sup> See Metzger, *supra* note 1, at 7 (urging the “reorient[ation]” of “constitutional analysis to consider[] not just constitutional constraints on government but also constitutional obligations to govern”).

<sup>60</sup> *Id.* at 90 (“Simply from the proposition that delegated power must be faithfully executed, then, the outlines of a constitutionally mandated administrative state begin to emerge.”).

<sup>61</sup> *Id.* (“Delegation comes with constitutional strings attached. Having chosen to delegate broad responsibilities to the executive branch, Congress has a duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions.”); *id.* at 89 (“It follows [from the Take Care Clause] that the administrative capacity the President needs in order to satisfy the take care duty is also required.”).

<sup>62</sup> *Id.* at 89–90.

important aspects of which she has also defended elsewhere<sup>63</sup> — has the potential to flip the fundamental terms of the debate over such actions. Consider, for example, one of the Obama Administration’s deferred-action immigration programs and the dangling question the Supreme Court left undecided concerning its legality<sup>64</sup> — the question, posed by the Court itself, “[w]hether the Guidance violates the Take Care Clause of the Constitution.”<sup>65</sup> While the lower court and some scholars have been engrossed in debating whether the deferred-action policy ought to have been promulgated in compliance with the ordinary procedures for notice-and-comment rulemaking,<sup>66</sup> or whether it comported with the values that the “small-c” administrative constitution seeks to shield,<sup>67</sup> Metzger has swept above that skirmish by placing this policy on the plane of the “large-C” Constitution. Such a prospective nonenforcement policy, Metzger has argued, has “strong constitutional roots”<sup>68</sup> because it enables the President to perform his Article II–based duty to supervise the execution of the laws.<sup>69</sup> Given the de facto delegation of immigration lawmaking power to the executive,<sup>70</sup> and the President’s obligation to supervise how lower-level officials enforce that law,<sup>71</sup> Metzger has contended, it would raise constitutional problems to *forbid* the adoption of categorical and prospective programs of non-enforcement in the immigration context.<sup>72</sup> In other

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<sup>63</sup> See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) [hereinafter Metzger, *Duty to Supervise*].

<sup>64</sup> United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (affirming the judgment below by a 4–4 equally divided Court).

<sup>65</sup> United States v. Texas, 136 S. Ct. 906 (2016) (mem.) (granting writ of certiorari and posing additional question).

<sup>66</sup> See Texas v. United States, 809 F. 3d. 134, 146, 150, 186–88 (5th Cir. 2015) (holding that Texas had standing to challenge DAPA and granting nationwide preliminary injunction against enforcement of DAPA because, inter alia, the plaintiffs were likely to succeed on the merits of the claim that the administration should have used notice-and-comment rulemaking to adopt DAPA), *aff’d by an equally divided court*, 136 S. Ct. 2271; Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 269–72 (2017); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017); Kathryn Watts, *Rethinking Remedies*, JOTWELL (Jan. 17, 2017), <http://adlaw.jotwell.com/rethinking-remedies/> [https://perma.cc/D9DD-JRZL].

<sup>67</sup> Sohoni, *supra* note 37, at 950–56.

<sup>68</sup> Metzger, *Duty to Supervise*, *supra* note 63, at 1929 (“Acknowledging a constitutional duty to supervise thus indicates that presidential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots.”).

<sup>69</sup> *Id.* at 1929 (“[B]y openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, the President and DHS Secretaries Napolitano and Johnson were actually fulfilling their constitutional duties to supervise.”).

<sup>70</sup> Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108 (2015).

<sup>71</sup> See Metzger, *Duty to Supervise*, *supra* note 63, at 1929.

<sup>72</sup> *Id.* (“The public articulation of the administration’s policies ensured that enforcement choices would be more transparent, thereby enhancing political accountability, as well as more consistent across the nation and among immigration personnel. Precluding prospective and cate-

words, the question that the Court posed — whether the Guidance *violated* the Take Care Clause — had it almost backwards; instead, the correct question to ask was whether the Take Care Clause *required* that the President be able to issue the Guidance.

### III. THE CONSTITUTIONAL OBLIGATION OF ADMINISTRATIVE GOVERNMENT

Had the Court posed the question thus, the challenge would still remain how to answer it — and how to answer the analogous questions that will be raised in myriad contexts across the regulatory state. The Foreword’s answer is simple — and radical. The project of constitutional analysis must be “reorient[ed],” Metzger urges, to encompass not merely “constitutional constraints on government but also constitutional obligations to govern.”<sup>73</sup> That obligation to govern, she contends, means that we *must* have an administrative state, “with its bureaucracy, expert and professional personnel, and internal institutional complexity.”<sup>74</sup> The obligation to ensure “accountable, constrained, and effective” administrative government, she contends, may *require* that the executive branch be able to promulgate regulations, conduct policymaking, adjudicate cases, and oversee the combined exercise of legislative, adjudicative, and executive functions.<sup>75</sup> Giving due weight to the duty to govern may *require* judicial deference as well, both because that deference gives effect to a congressional decision to delegate power to an agency,<sup>76</sup> and also because courts must defer to agencies if courts are to “reach accurate, coherent and consistent determinations” in cases requiring “expert elucidation” of specialized statutory schemes.<sup>77</sup> Honoring the duty to govern may also impose limits on

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gorical articulation of immigration enforcement policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials, a requirement as much at odds with constitutional structure as a presidential dispensation power.” (footnote omitted)).

<sup>73</sup> Metzger, *supra* note 1, at 7.

<sup>74</sup> *Id.* at 71–72; *see also id.* at 89.

<sup>75</sup> *Id.* at 72; *see also id.* at 89–94.

<sup>76</sup> *Id.* at 93 (“[T]he constitutional separation of powers system requires that the courts honor congressional policy choices. And honoring congressional choices to delegate means deferring to agency judgments within the sphere of the agency’s constitutionally delegated authority.”); *id.* at 94 (“[I]f Congress has delegated such authority, then a necessary consequence of acknowledging Congress’s power to delegate is that courts should defer to agencies’ exercise of their delegated authority — and Chief Justice Roberts has acknowledged as much. Hence, a strong case can be made that accepting delegation does beget deference, leaving open the question of how much evidence of delegation should be required.” (footnote omitted)).

<sup>77</sup> *Id.* at 41 (“Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack. In such contexts, preserving the federal courts’ ability to perform their constitutional function and reach accurate, coherent, and consistent determinations may mandate deference to agency determinations.”).

congressional power; given that the Environmental Protection Agency (EPA) has to be able to faithfully execute its delegated powers, she contends, it may “begin to look constitutionally suspect” for Congress to “massively underfund[] the EPA” or to “repeal[] environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime.”<sup>78</sup>

In sum, the Foreword claims that a proper understanding of the Constitution makes the administrative state “constitutionally obligatory”;<sup>79</sup> it contends that given “the phenomenon of broad delegation,” the constitutionality of which is “not at risk of judicial invalidation,”<sup>80</sup> the administrative state must also follow as the “constitutional consequence[] of delegation.”<sup>81</sup> The executive branch may not always get what it wants; but — at least once it is delegated power — it must get what it needs.

On two scores, these claims give pause for thought. First, to conclude that the administrative state is constitutionally obligatory in nearly any respect would entail a sharp break with constitutional practice and historical understandings.<sup>82</sup> The Foreword emphasizes that there is scant support on the current Court for holding delegation unconstitutional,<sup>83</sup> but no support seems to have been voiced for the view that when Congress chooses to delegate, the Take Care Clause then places an affirmative duty on Congress to supply the executive branch with the financial resources needed to govern effectively or to enforce the laws adequately.<sup>84</sup> Nor has *Chevron* deference been treated as a “necessary consequence”<sup>85</sup> of delegation, if we take that claim to mean that it is constitutionally obligatory for courts to presume that when Congress delegates, it intends to delegate to agencies the authority to resolve ambiguities in the statute;<sup>86</sup> clearly, the Court regards itself to

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<sup>78</sup> *Id.* at 90.

<sup>79</sup> *Id.* at 7.

<sup>80</sup> *Id.* at 89.

<sup>81</sup> *Id.* at 90.

<sup>82</sup> I set aside here procedural requirements upon adjudications, which the Court has long held are constitutionally obligatory as a matter of due process. *See id.* at 93 & nn.547–48 (citing *Londoner v. City & County of Denver*, 210 U.S. 373, 385–86 (1908)).

<sup>83</sup> *Id.* at 88–89.

<sup>84</sup> *Cf. id.* at 90.

<sup>85</sup> *Id.* at 93.

<sup>86</sup> *See* Jack Goldsmith & John F. Manning, Essay, *The President's Completion Power*, 115 YALE L.J. 2280, 2299 (2006) (“[T]he Court has never suggested that the *Chevron* rule is constitutionally required.”); Thomas W. Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 864–67 (2001) (critiquing arguments that *Chevron* “rests on the constitutional principle of separation of powers”); *cf.* Cass R. Sunstein, Essay, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (“In the years since *Chevron*, a consensus has developed on an important proposition, one that now provides the foundation for *Chevron* itself: The executive's law-interpreting power turns on congressional will. If Congress wanted to repudiate *Chevron*, it could do precisely that.”).

be empowered to deny deference or to cut back on the boundaries of *Chevron's* domain, and — as evidenced by the existing system of enforcing the federal criminal code — even broad delegations of authority to implement statutory provisions have not been treated as mandating judicial deference to the agency charged with implementing the scheme.<sup>87</sup> Nor has the principle of separation of powers yet been treated as requiring either the creation or the continued existence of internal administrative constraints,<sup>88</sup> such as expert government employees or an independent civil service, even though these elements of administrative government may help to prevent presidential unilateralism and ensure that the executive branch will exercise delegated power in a legally or politically accountable manner.<sup>89</sup> In advancing these propositions, the Foreword urges shifts in constitutional law that could both greatly increase executive branch power and also sharply rein in unilateral presidential power. But it refrains from supplying a meta-theory for evaluating when changes in the constitutional regime of such potential scope and consequence are warranted. Nor does it expressly address why one should feel confident that, as an empirical matter, these cross-cutting effects would, on net, leave us with an adequately constrained executive branch and President.

Second, the claim that the administrative state is constitutionally obligatory pivots on a threshold premise that some will find hard to stomach: the proposition that delegation is both constitutional and “such a fundamental and necessary feature of contemporary government that it is mandatory in practice.”<sup>90</sup> After all, the conviction that delegation is unconstitutional is the igniting spark, if not the entire engine, of anti-administrativism; the idea that delegation is “fundamental,” or “necessary,” or “mandatory in practice,” is precisely the kind of idea that many anti-administrativists most fiercely contest. From the early twentieth-century history of political contestation about the administrative state, many have gleaned the message that Metzger draws — that those who do battle against delegation’s constitutionality are fighting the last war.<sup>91</sup> But the history of the 1930s equally may be

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<sup>87</sup> *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); cf. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 HARV. L. REV. 469 (1996) (arguing for reforming deference doctrine so that the Department of Justice would receive *Chevron* deference in its interpretation of criminal laws).

<sup>88</sup> Cf. Metzger, *supra* note 1, at 90–91 (“The constitutional consequences of delegation can be pushed further, to include a requirement of some internal administrative constraints of the kind described above.”); *id.* at 89–90.

<sup>89</sup> See *id.* at 83–84 (describing how internal administrative constraints “diffuse power within the executive branch to forestall presidential aggrandizement,” *id.* at 83).

<sup>90</sup> *Id.* at 91.

<sup>91</sup> See *id.* at 95 (“It is time to move past the constitutional anti-administrativism of the 1930s. That constitutional vision failed to persuade in its own time and is now deeply out of step with

read to demonstrate the huge scale of the transformations in constitutional law that can occur because of a shift in the Court's stance following the election of a President bent on making a radical break with extant constitutional understandings.<sup>92</sup> Today, the sitting President was placed into office in part by campaigning on an anti-administrativist platform,<sup>93</sup> and he may have the opportunity to appoint hundreds of judges that share his anti-administrativist aims.<sup>94</sup> To assume that the status quo on delegation will persist is to elide a key lesson of the 1930s — that constitutional revolutions happen.

Let us set these points aside, and stipulate that the courts will continue to regard broad delegations as constitutional,<sup>95</sup> in order to probe the Foreword's contention that, given delegation, the administrative state comes clothed with affirmative constitutional protections.<sup>96</sup> Put another way, if we take it as a given that delegation is constitutional and a necessary feature of government, what are the kinds of arrangements that are also constitutionally necessary to ensure that the executive branch has the necessary tools to carry out its duty to govern accountably and effectively? For future executive branch lawyers who want to argue for the validity of a given type of regulatory power, or for future litigants who wish to attack some perceived agency overreach, what will have to be demonstrated to establish (or to defeat) the claim that a given aspect of administrative law or practice is a constitutionally required "consequence" of delegation?<sup>97</sup>

Perhaps the broadest way to implement Metzger's account (and this is my own formulation, not one proposed by Metzger) would be to view Article II as implicitly giving the executive branch something like its own "necessary and proper" power.<sup>98</sup> On this view, anything that

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the realities of national government."); *id.* at 72 (noting that "broad statutory delegations of authority to the executive branch . . . are here to stay"); *id.* at 89.

<sup>92</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 342–43 (1991); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165, 2170 (1999).

<sup>93</sup> See Eliza Newlin Carney, *Trump's Assault on the "Administrative State,"* *AM. PROSPECT* (May 18, 2017), <http://prospect.org/article/trump-s-assault-administrative-state> [https://perma.cc/GE2N-KAPG]; Rucker & Costa, *supra* note 34.

<sup>94</sup> See Metzger, *supra* note 1, at 5 & n.19, 6 & n.20.

<sup>95</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 *U. CHI. L. REV.* 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

<sup>96</sup> Due to length limitations, I bracket for the remainder of the discussion Metzger's equally interesting suggestion that honoring the constitutional obligation to govern may entail the existence of "internal administrative constraints" on executive branch power. See Metzger, *supra* note 1, at 90–91.

<sup>97</sup> The "claim" does not necessarily need to be a claim in court; Professor Metzger writes that Congress's "duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions" is one that is "unlikely to be judicially enforceable." *Id.* at 90.

<sup>98</sup> This formulation for implementing Metzger's account draws its inspiration from an essay by Professor Jack Goldsmith and Dean John Manning in which they contend, inter alia, that the executive branch has a defeasible and presumptive ability to carry out statutes grounded in Article

the executive branch deemed necessary and proper to carrying out a delegation would be deemed constitutionally protected,<sup>99</sup> and the executive branch would receive deference in determining any “factual predicates necessary to conclude that a given action is appropriate.”<sup>100</sup> This approach would effectively extend an umbrella of constitutional protection to anything that the executive branch did that was plausibly connected to implementing its delegated powers — whether that was rulemaking, guidance, waiver, prospective nonenforcement policy, OIRA review, or in-house adjudication. This approach would, as well, mandate deferring to the executive branch’s interpretation of statutes and to its own regulations, because such deference would promote the value of democratically accountable executive branch control over government.<sup>101</sup>

Adopting that approach would have the benefit of simplicity. It would, however, also have the uncomfortable consequence of ousting Congress almost entirely from the role of specifying how administrative government ought to operate — a result that sits uneasily with historical understandings and democratic principles. It would also carry risks; as Professor Jack Goldsmith and Dean John Manning have pointed out in reference to James Madison’s cautionary remarks on Congress’s necessary-and-proper power, “one can always spin out ways in which remoter and remoter means can be related to some broadly framed end.”<sup>102</sup>

I doubt that Metzger would find appealing that implementation of her account,<sup>103</sup> and I know that I do not.<sup>104</sup> If, however, one attempts

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II, and that *Chevron* deference can be justified as a default assumption that Congress would have intended the executive branch to enjoy such deference. See Goldsmith & Manning, *supra* note 86, at 2298–99.

<sup>99</sup> See *id.* at 2306–07 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise.” (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866))); *cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (setting out Congress’s power under the Necessary and Proper Clause).

<sup>100</sup> *Cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507, 584 (2004) (Thomas, J., dissenting) (arguing for this type of deference in the national security realm).

<sup>101</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices [left unresolved by Congress].” *Id.* at 865.).

<sup>102</sup> Goldsmith & Manning, *supra* note 86, at 2307.

<sup>103</sup> As Metzger notes, a “critical formal link to democratic choices . . . justifies imposing conditions from delegation”: decisions “about the shape of government” should be “subject to popular control,” that is, control by Congress. Metzger, *supra* note 1, at 91.

<sup>104</sup> To illustrate my own misgivings, consider that the SEC has argued that it should have the authority to set by regulation the existence of selective waiver — that is, it has claimed that to achieve the “end” of enforcing securities laws, it must be able to use the “remote[] means” of altering the background rules of the law of evidentiary privileges. See Mila Sohoni, *The Power to*

to construct a narrower formulation of what the executive branch requires in order to govern, then some difficult line-drawing problems arise. Begin with rulemaking. Certainly, to implement a statute as complex as the Affordable Care Act (ACA), many regulations must be promulgated. But what if the Department of Health and Human Services were to use that rulemaking power to create exemptions to statutory requirements for entities who had philosophical objections to the ACA's rules — say, to the rule requiring the provision of contraceptives without cost sharing?<sup>105</sup> Such an exemption might reflect the executive branch's considered conclusion that effectively carrying out its regulatory mission requires it to draw the rules with large holes in them, in order “to reduce and relieve regulatory burdens and promote freedom in the health care market.”<sup>106</sup> Is the power to craft such an exemption, for such a reason, a part and parcel of — a “constitutional string” attached to<sup>107</sup> — the initial delegation?

Turning to adjudication, consider the SEC's recent shift away from courts and toward administrative settlement, which Professor Urska Velikonja has described.<sup>108</sup> As Velikonja explains, rather than face the scant handful of federal judges willing to ask rude questions about its settlement choices,<sup>109</sup> the SEC moved a large proportion of its administrative settlements in-house, with the consequence that courts did not review them until after they were finalized.<sup>110</sup> For the SEC to have the capacity to settle cases is surely valuable;<sup>111</sup> and dealing with such

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*Privilege*, 163 U. PA. L. REV. 487, 512–16 (2015). I have cautioned against giving agencies the power to create evidentiary privileges through regulation. *Id.* at 534–43.

<sup>105</sup> See Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) [hereinafter Moral Exemptions Rule]; Robert Pear, *Trump Rule Could Deny Birth Control Coverage to Hundreds of Thousands of Women*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/us/politics/birth-control-women-trump-health-care.html> [<https://perma.cc/GLD5-ZDXA>] (“[T]he administration says . . . it will ‘exempt any entity possessing religious beliefs or moral convictions against the coverage required by the mandate, regardless of its corporate structure or ownership interests.’”).

<sup>106</sup> Moral Exemptions Rule, *supra* note 105, at 47,848.

<sup>107</sup> Metzger, *supra* note 1, at 90 (“Delegation comes with constitutional strings attached.”).

<sup>108</sup> Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J.F. 124 (2016).

<sup>109</sup> *Id.* at 126 (“Most judges perceived their review duties as limited and rubber-stamped most settlements. But sometimes, judges pushed back. As a result, both the SEC and defendants perceived in-court settlements as costly and unpredictable with ambiguous benefit to them.”).

<sup>110</sup> *Id.* (“Before Dodd-Frank, 40% of settlements were filed in administrative proceedings; in fiscal year 2015, over 80% were.”); *id.* at 133 (“In administrative proceedings, the SEC opens and closes a settled action on the same day; there is never an opportunity for third-party review before the settlement is finalized, even informally.”).

<sup>111</sup> See *N.Y. State Dep’t of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993) (“As a general matter, the FCC is best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency (including financial and opportunity costs) and the likelihood of success; moreover, it is not exercising coercive power over an individual.”); *cf.* *SEC v. Randolph*, 736 F.2d 525, 529–30 (9th Cir. 1984) (“Compromise is the essence of a settlement. . . . The SEC’s resources are



settlements in-house may enhance the ability of the SEC's leadership to steward and supervise the administration of the securities laws. But does the SEC also *have* to have the power to reach so many of its settlements in-house, without meaningful judicial review before the settlements are finalized? Is such a power constitutionally obligatory, too, as a "string" attached to the SEC's delegated authority?

One or two of the regulatory reform ideas that are now under consideration would also pose tough questions. Consider, for example, the proposal that Congress enact legislation requiring all rules to sunset after fifteen years.<sup>112</sup> Would such a law be permissible in a world in which the "administrative capacity" necessary to carry out delegations was treated as constitutionally mandated?<sup>113</sup> If the law is viewed as a post hoc limit upon the scope of an earlier delegation — akin to a statutory restriction on whether an agency can adjudicate cases or not, or issue binding rules or not — then perhaps it would be entirely permissible.<sup>114</sup> On the other hand, a regulatory sunset law would surely consume agency resources by forcing ongoing and costly reconsiderations of slews of earlier-promulgated regulations. Holding constant the resources that Congress supplied to the agency, such a law would hinder the agency from executing the other functions that Congress has also delegated to it — a consequence that, on Metzger's logic, may be "constitutionally suspect."<sup>115</sup> If that level of hindrance were sizeable, would this new string on delegation snap, or would the older strings give way?

The point is just that recognizing a constitutional obligation to govern contingent upon delegation still leaves us with the challenge of tethering particular administrative procedures, or particular degrees of executive branch latitude, to the initial anchor of a delegation. Many things might be *consistent* with carrying out a delegation; but saying that any are *obligatory* is far more difficult. Judges (or politicians or scholars), even those wholly convinced of the benefits of the modern

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limited, and that is why it often uses consent decrees as a means of enforcement. . . . The initial determination whether the consent decree is in the public interest is best left to the SEC and its decision deserves our deference.").

<sup>112</sup> See DeMuth, *supra* note 36, at 182–83.

<sup>113</sup> Metzger, *supra* note 1, at 89.

<sup>114</sup> Metzger, *supra* note 1, at 92–93 ("Certainly, if Congress has required an agency to implement its delegated authority through rulemaking, it would be implausible to claim that an agency must nonetheless engage in administrative adjudication to faithfully execute its delegated powers. Similarly, if Congress has prohibited or even not authorized an agency to issue binding rules, then the power to do so cannot be inferred from delegation.").

<sup>115</sup> *Id.* at 90 ("Moreover, from this proposition [that delegated power must be faithfully executed] some proposed anti-administrative measures, such as massively underfunding the EPA without altering its statutory responsibilities or repealing environmental rules necessary to implement delegated authority without adopting an alternative enforcement regime, begin to look constitutionally suspect." (footnote omitted)).

administrative state, may hesitate to regard any particular facet of administrative government as a necessary consequence of delegation, as a feature that Congress cannot defease or that courts must ratify. That, in turn, would leave ample room for the accretion of various anti-administrativist challenges and legislative cutbacks, the sum total of which may eventually resemble the wholesale rejection of administrative government for which some voices plead.<sup>116</sup>

To state the obvious, the questions just raised have largely been questions of application and implementation. They have sought to specify, rather than to deny, the Foreword's highly original claim: the proposition that the obligation to govern should carry affirmative constitutional protections, not just constitutional constraints. Constitutional principles, new and old, gain their substance from the type of iterative line-drawing that comes from posing and answering such questions. And there is no escaping the urgency of the Foreword's core message — that supporters of administrative government would do well to devote their energies to the task of making an affirmative case for the regulatory state, instead of just defensively responding to attacks on it.

#### CONCLUSION: OF PENNIES, POUNDS, AND PENCE

The Foreword portrays the current moment as a “redux” of the 1930s. I agree; and I think, too, that adopting that viewpoint places into its proper perspective Metzger's own intervention. In it, one can discern echoes of the words spoken by President Franklin Delano Roosevelt in a barn-burner of a speech he delivered at Madison Square Garden in New York, in the fraught days just before his landslide reelection in 1936. For a dozen years before he took office, President Roosevelt said, the nation had been “afflicted with hear-nothing, see-nothing, do-nothing Government.”<sup>117</sup> “Powerful influences,” he warned, were “striv[ing] today to restore that kind of government with its doctrine that that Government is best which is most indifferent.”<sup>118</sup>

In its reframing of the constitutional stakes of the debate over the administrative state, the Foreword seeks to accomplish for administrative law something akin to what President Roosevelt sought to accomplish for the idea of government and all it might accomplish. Instead of seeing that administrative state as best which is most enfeebled and most externally limited, Metzger urges us to see that administrative

<sup>116</sup> See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

<sup>117</sup> President Franklin D. Roosevelt, Campaign Address at Madison Square Garden: We Have Only Just Begun to Fight (Oct. 31, 1936), in 5 *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 566, 568 (1938).

<sup>118</sup> *Id.*

state as best which is most energetic, most internally accountable, and most effective at governing. Today, as when President Roosevelt spoke in 1936, giving full effect to Metzger's vision would require a sharp shift in the "reigning constitutional discourse" — now, a shift away from questions of constitutional constraints on administrative government and toward the "scope and nature of constitutional obligations to govern."<sup>119</sup>

It is there, then, that I end, very nearly where I began, with a reluctant word of caution on the potential shifts in "reigning constitutional discourse" we may now face — a word on pennies, pounds, and Pence. The Foreword's contention is that if you are in for a penny — with delegation — then you are in for a pound — the administrative state. But *if* delegation does come with strings attached, and *even if one is fully persuaded that these are the strings*, the fact would still remain that the administrative state is only constitutionally obligatory *if* delegation is constitutionally permissible. Future Justices in the mold of Justice Thomas or Justice Gorsuch may rather take back the penny than pay the pound.<sup>120</sup> There is, after all, no Franklin Delano Roosevelt sitting in the White House today. And we may be (at most) one President Pence away from seeing the Supreme Court controlled by a majority of such Justices.

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<sup>119</sup> Metzger, *supra* note 1, at 95.

<sup>120</sup> See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153–55 (10th Cir. 2016) (Gorsuch, J., concurring); *United States v. Nichols*, 784 F.3d 666, 668–70 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).