Deconstruction (Not Destruction)

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

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

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

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

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

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

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

icy concerns). Accordingly, critics of regulatory power demanded "safeguards" to prevent "arbitrary conduct," even though safeguards, by their nature, preclude some of the potential benefits of expertise.[13]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ENDNOTES

[1] See, for example, Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (1) (2017), quoting Philip Rucker and Robert Costa, "Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,'" *The Washington Post*, February 23, 2017.

[2] See, for example, Jeffrey A. Pojanowski, "Neoclassical Administrative Law," *Harvard Law Review* 133 (3) (2020): 853, 888, noting their skepticism of agency-empowering doctrines.

[3] See, for example, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), weakening deference to an agency's interpretation of its own regulations; *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), rejecting deference where the Department of Justice and National Labor Relations Board disagree on interpretation; *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018); and *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

[4] See, for example, Aaron L. Nielson, "Confessions of an 'Anti-Administrativist,'" *Harvard Law Review Forum* 131 (1) (2017): 6.

[5] "Deconstruction," Merriam-Webster.com, defining "deconstruction" as "the analytic examination of something (such as a theory) often in order to reveal its inadequacy" and noting that some people incorrectly define it as synonymous with "demolition." See also J. M. Balkin, "Being Just with Deconstruction," *Social & Legal Studies* 3 (3) (1994): 393, explaining that "a very ordinary sense" of deconstruction "involves pointing out that something is wrong and arguing that it could and should be made better."

[6] See, for example, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203–2204 (2020). "Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties."

[7] For a more complete version of this history, see Aaron L. Nielson, "Visualizing Change in Administrative Law," *Georgia Law Review* 49 (3) (2015): 757.

[8] Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* 123 (6) (1975): 1267, 1271.

[9] *ICC v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 93 (1913).

[10] Sidney Shapiro, Elizabeth Fisher, and Wendy Wagner, "The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy," *Wake Forest Law Review* 47 (2012): 463, 471.

[11] Woodrow Wilson, "Democracy and Efficiency," *Atlantic Monthly* 87 (1901): 289, 299. "We lack in our domestic arrangements, above all things else, concentration, both in political leadership and in administrative organization."

[12] Shapiro et al., "The Enlightenment of Administrative Law," 469.

[13] Felix Frankfurter, "The Task of Administrative Law," *University of Pennsylvania Law Review* 75 (7) (1927): 614, 618.

[14] Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2245, 2261, discussing James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938).

[15] *Whitman v. American Trucking Associations*, 531 U.S. 457, 474 (2001). In 1935, the Supreme Court held, unanimously, that Congress cannot delegate that much authority. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The story, perhaps apocryphal, is that after *Schechter Poultry* was decided, Justice Louis Brandeis privately told the White House that the Court would not "let this government centralize everything." David P. Currie, "The Constitution in the Supreme Court: The New Deal, 1931–1940," *University of Chicago Law Review* 54 (2) (1987): 504, 544, n. 181.

[16] Walter F. Dodd, "Administrative Agencies as Legislators and Judges," *American Bar Association Journal* 25 (11) (1939): 923, 925, quoted in Shapiro et al., "The Enlightenment of Administrative Law."

[17] See Nielson, "Visualizing Change in Administrative Law," 769–771, discussing this history.

[18] George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review* 90 (4) (1996): 1557, 1562.

[19] Ibid., 1558.

[20] See, for example, ibid., 1649–1652, 1654–1657.

[21] See Nielson, "Visualizing Change in Administrative Law," 774–788, discussing this history.

[22] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[23] Cass R. Sunstein, "Beyond *Marbury*: The Executive's Power to Say What the Law Is," *The Yale Law Journal* 115 (9) (2006): 2580, 2589.

[24] See, for example, Daniel J. Hemel and Aaron L. Nielson, "*Chevron* Step One-and-a-Half," *The University of Chicago Law Review* 84 (2017): 757, 772.

[25] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

[26] See, for example, Neal Devins and David E. Lewis, "Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review* 88 (2008): 459, 491. "Common sense and existing scholarship point to the increasing identity of interests between the President and independent-agency commissioners from the president's party." See also Kagan, "Presidential Administration," 2277–2281, 2284–2289, 2290–2299, 2308–2309.

[27] Richard H. Pildes and Cass R. Sunstein, "Reinventing the Regulatory State," *The University of Chicago Law Review* 62 (1) (1995): 4.

[28] See, for example, Friedrich A. Hayek, "The Use of Knowledge in Society," *The American Economic Review* 35 (4) (1945): 519–530.

[29] See, for example, Wentong Zheng, "The Revolving Door," *Notre Dame Law Review* 90 (3) (2015): 1265, explaining "the incentive for regulators to expand the market demand for services they would be providing when they exit the government."

[30] See, for example, Wendy E. Wagner, "The Science Charade in Toxic Risk Regulation," *Columbia Law Review* 95 (7) (1995): 1613, 1640–1650, offering examples of confusing jargon.

[31] See, for example, Jonathan R. Macey, "Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty," *Cardozo Law Review* 15 (1994): 909.

[32] Kagan, "Presidential Administration," 2261.

[33] Ibid.

[34] James V. DeLong, "New Wine for a New Bottle: Judicial Review in the Regulatory State," *Virginia Law Review* 72 (2) (1986): 399, 429. "The steady growth of the Regulatory State has greatly increased the number of grants of authority that agencies may exploit."

[35] Kagan, "Presidential Administration," 2248.

[36] See, for example, Jerry L. Mashaw and David Berke, "Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience," *Yale Journal on Regulation* 35 (2) (2018): 549, 606, offering examples.

[37] See, for example, Kevin K. Ho, "Trading Rights and Wrongs: The 2002 Bush Steel Tariffs," *Berkeley Journal of International Law* 21 (3) (2003): 825, 826–834; and *Gonzalez v. Oregon*, 546 U.S. 243, 251–254 (2006).

[38] Scott Wilson, "Obama's Rough 2013 Prompts a New Blueprint," *The Washington Post*, January 25, 2014.

[39] See, for example, Mashaw and Berke, "Presidential Administration in a Regime of Separated Powers," 563–568, 579–582, discussing DACA/DAPA and net neutrality.

[40] See, for example, ibid., 569–573, discussing immigration restrictions; and Executive Order No. 13767, *Federal Register* 82 (8793) (2017), ordering construction of a border wall.

[41] See, for example, John Manning, "Lawmaking Made Easy," *Green Bag* (2d) (2007): 191, 200, explaining that "a multicameral system . . . makes it harder even for a majority to enact self-interested or oppressive legislation."

[42] *Global Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman concurring); and Laurence H. Silberman, "*Chevron* – The Intersection of Law & Policy," *The George Washington Law Review* 58 (5) (1990): 821, defending *Chevron*.

[43] See, for example, Abbe R. Gluck and Richard A. Posner, "Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals," *Harvard Law Review* 131 (5) (2018): 1298, 1302, offering data demonstrating that a majority of surveyed federal circuit judges "are not fans of *Chevron*"; and ibid., 1348; "The judges expressing skepticism regarding *Chevron* divide equally among liberals and conservatives."

[44] While he was still a circuit judge, Neil Gorsuch concluded that immigration officials cannot apply an agency interpretation retroactively to the detriment of someone who did what a court had previously said was lawful. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). This decision is one that his critics often cite to show that Gorsuch is a skeptic of the administrative state.

[45] See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008), describing the prospect of "unknowable law" as "literally Orwellian," citing George Orwell, *Animal Farm* (Boston: Harcourt, 1946), 102–103. See also ibid., quoting Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (4) (1989): 1175, 1179; "One of emperor

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

[46] See, for example, Frank H. Easterbrook, "Textualism and the Dead Hand," *George Washington Law Review* 66 (1998): 1119; Aaron L. Nielson, "Dead Hands," *Yale Journal on Regulation*, July 26, 2019, https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-dead-hands/; and Jonathan H. Adler and Christopher J. Walker, "Delegation and Time," *Iowa Law Review* 105 (5) (2020).

[47] See Aaron L. Nielson, "Sticky Regulations and Net Neutrality Internet Freedom," *Hastings Law Journal* 71 (2020); and Tony Romm, "Pressure Builds on Biden, Democrats to Revive Net Neutrality Rules," *The Washington Post*, January 27, 2021.

[48] See, for example, Jonathan Masur, "Judicial Deference and the Credibility of Agency Commitments," *Vanderbilt Law Review* 60 (4) (2007): 1021, 1037–1060.

[49] Nielson, "Visualizing Change in Administrative Law," 762.

[50] See, for example, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy concurring).

[51] *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007). As I have explained elsewhere, "the Court does not want to tear everything down. But when confronted with new problems–or the emergence of more virulent strains of old problems–the Court also recognizes that it is not bound by stare decisis and so uses traditional legal tools to try to get the law right." Nielson, "Confessions of an 'Anti-Administrativist,'" 10.

[52] See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

[53] See, for example, ibid., 2424 (Roberts concurring in part).

[54] See, for example, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). For what it is worth, giving the president greater control over agencies does not address the problem of presidents aggressively using regulatory power, which requires reform to deference and the like. But, at least in theory, it may help limit other pathologies, such as agency officials pursuing self-interests.

[55] Mark Joseph Stern, "The Supreme Court's Conservatives Are Ready to Take a Wrecking Ball to the Entire Federal Bureaucracy," *Slate*, June 20, 2019, https://slate.com/news-and-politics/2019/06/neil-gorsuch-supreme-court-conservatives-gundy-sex-offender.html.

[56] See *Paul v. United States*, 140 S. Ct. 342, 342 (Kavanaugh concurring); and *U.S. Telecom Association v. FCC*, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh dissenting).

[57] See, for example, Christopher J. Walker, "Modernizing the Administrative Procedure Act," *Administrative Law Review* 69 (3) (2017): 629, discussing possible reforms.

[58] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962).