

Assessing the Administrative State

J. Harvie Wilkinson III♦

The advent of the Trump Administration has focused attention on a great many issues but none more so than the administrative state. The Obama Administration's evident reliance on, and even fondness for, the capacities of agencies has given way, at least tentatively, to a spate of appointments with a pronounced deregulatory bent. President Trump has promised that "[w]e're going to be cutting regulation massively,"¹ and he directed, for starters, that any further regulations proposed by the Obama Administration be frozen. Whether this portends an all-out assault on the administrative state and whether such an effort can move a bureaucracy entrenched in its established ways remains to be seen. It does, however, afford the legal profession a chance to attempt an objective and even dispassionate view of an arcane and technocratic apparatus that yet manages to elicit passionate reaction from friend and foe alike.

This whole struggle would have perplexed the founding generation. For all his genius, James Madison failed to anticipate, and probably could not anticipate, two large developments: the Fourteenth Amendment and the administrative state. The Fourteenth Amendment is of course an explicit part of our constitutional fabric. The administrative state, by contrast, has come of age in constitutional silence, or perhaps in the interstices of the document.

That does not mean the administrative state is somehow illegitimate. As a practical matter, it is water over the dam. Its formative period in the Progressive Era and New Deal is long past. We are right both to extol its benefits and to lament its abuses. But both for better and worse, the basics of the administrative state seem rather firmly in place. In one form or another, it is here to stay.

To appreciate the fact, remember that the administrative state is not solely a federal phenomenon. Each state has its administrative apparatus as well. Some version of the administrative state is simply a feature of the complex

♦ U.S. Circuit Judge for the United States Court of Appeals for the Fourth Circuit. This Essay is adapted from Judge Wilkinson's keynote address on October 21, 2016 to a conference, *Reining in the Administrative State*, sponsored by The Heritage Foundation and the Journal of Law and Politics and held at the University of Virginia.

¹ Jenna Johnson and David Nakamura, *Trump Takes Aim at Federal Workers, Trade Deals as He Settles into White House*, WASH. POST, Jan. 23, 2017, https://www.washingtonpost.com/politics/trump-takes-aim-at-federal-workers-trade-deals-as-he-settles-into-white-house/2017/01/23/cf01ea22-e18a-11e6-ba11-63c4b4fb5a63_story.html.

world in which we live. The challenge is how to reap its considerable benefits without succumbing to its abundant capacity for oppression.

I. INTRODUCTION

This Essay will first explore the benefits of the administrative state and second its drawbacks. Third, I want to take up briefly some suggestions for reform. The overarching question is what form change should take.

I would be remiss if I did not acknowledge the distinguished field of academic participants at this conference. I willingly concede that the considerable thought you have given this subject far surpasses my own. What I wish to do is simply advance some practical thoughts on administrative law that arise from a judicial perspective.

The theoretical arguments that can be directed at the administrative state are often both useful and powerful, but my own constant exposure to it from the bench has led me to believe that the path forward should be more one of incremental change and improvement than wholesale transformation and rejection. Perhaps an appropriate theme of my remarks would be simply this: short steps add up. Small improvements in sufficient number mean a lot. And rather than issuing sweeping and predictably futile pronouncements declaring the entire administrative state unconstitutional, Congress and the judiciary must reclaim their rightful place by wielding powers that legislatures and courts already possess. The case for reform must develop a political following, not just an academic one.

Why has the administrative state grown so large, and come to play such a pervasive and dominant role in American life? Part of the answer, of course, is that society itself has become more complex and specialized. The Progressive Era thinker Herbert Croly would have us believe that this complexity requires an elite class of social engineers and moral philosophers just to make things work.²

But let's not pin the whole blame on Mr. Croly. Many other things explain the growth of the administrative state as well. When Congress becomes balky, Presidents have often been tempted to turn to the administrative state to achieve their goals. It's often less messy than politics, and more efficient than that pesky bicameralism. Then too, agencies have

² See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 196 (1909) ("The essential wholeness of the community depends absolutely on the ceaseless creation of a political, economic, and social aristocracy and their equally incessant replacement.").

accreted power to themselves and, on occasion, pushed their authority to and beyond appropriate limits.

The remarkable thing, however, about the growth of the administrative state is that it filled a vacuum left when the legislative and judicial branches, for reasons of their own, ceded enormous authority to bureaucratic judgment. Madison and the Framers thought each branch of government would seek to amass power and influence for itself, thereby underscoring the need for checks and balances. Instead, the reverse has often happened. We witness the odd phenomenon of several branches of government only too eager to divest themselves of their rightful prerogatives.

Why Congress delegated such broad swaths of authority to agencies is easy to understand: it is difficult to legislate in minute detail upon intricate and technical subjects where the body of knowledge is changing and growing by the day. As a practical matter, the legislative process just cannot keep up. There are less flattering explanations as well. What sometimes makes the passage of controversial legislation possible is congressional punting on some of the most volatile issues, thereby allowing an agency to take the heat down the road. Agencies have grown in part because Congress simply wished to avoid hard questions.

The judiciary has also played its part in the growth of the administrative state. The theory has been that judges are generalists and bureaucrats are specialists and that generalists should be the ones to defer, at least so long as the specialists don't act arbitrarily or move patently beyond the limits of authority delegated to them. But here, as with Congress, there is a less flattering explanation too. The habit of deference to any "reasonable" agency regulation or adjudication under the agency's enabling statute bespeaks a willingness on the part of courts to take the easy way out. Deference to a point is necessary. But beyond that point, deference operates as an encouragement to lazy or sloppy judging.

I have long believed that courts should demonstrate judicial restraint when asked to overturn statutes on constitutional grounds. For many reasons, a presumption of judicial deference toward the enactments of the co-equal Article I branch of government is justified.

Whether a similar judicial deference toward unelected administrative bodies is warranted is a more difficult question. Agencies have their unquestioned virtues, but they are in so many ways unaccountable. The thin layer of political appointments at the head of many departments and agencies is often no match for bureaucrats whose habits are ingrained and whose tenure will in all events outlast the tenure of the political appointees who nominally supervise them.

The very size of the administrative state has also made it impenetrable and thus less accountable. We often use the word “faceless” to express our frustration at this impersonal leviathan. The sheer mass of the administrative state makes it difficult to keep track of. As President Kennedy famously opined to one of his constituents, “I agree with you, but I don’t know if the government will.”³ There is niche press coverage of, for example, the Food and Drug Administration, but the activities of most of our civil servants fly far beneath the radar. Their many good deeds often go unnoticed, and their truly bad ones are not discovered until it is too late.

What follows is a brief overview of the chief benefits and serious problems with the administrative apparatus. Despite the many blessings the administrative state at its best confers, the problems are mounting, and they are serious enough to demand that we pose the question: what are we to do about it? The question is more easily posed than answered. People inveigh against the administrative state by the hour, at the end of which their punching bag shows nary a dent.

II. THE EMERGENCE OF THE ADMINISTRATIVE STATE

The American bureaucracy, for all its flaws, did not emerge from the mists. It arose out of a deeply felt need to respond to economic crises, intransigent forms of discrimination, and threats to public health and safety—a set of problems that were more complex, more challenging, and more pressing than anything the country had seen before.

The first independent regulatory commission dates back to 1887.⁴ But the modern incarnation of the administrative state, with agency discretion as its hallmark, emerged during the New Deal in response to the devastation wrought by the Great Depression.⁵ The architects of the New Deal, recognizing the erratic nature of the economy, installed agencies in a variety of areas touching on economic life. Agencies were set up to stabilize financial institutions,⁶ to secure honest capital markets,⁷ to make homes

³ RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY I* (1983).

⁴ Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383; *see also Interstate Commerce Commission*, FED. REGISTER, <https://www.federalregister.gov/agencies/interstate-commerce-commission> (last visited July 6, 2016).

⁵ *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253-55 (2001).

⁶ Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168-80 (Federal Deposit Insurance Corporation).

⁷ Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4, 48 Stat. 881, 885 (Securities and Exchange Commission).

more affordable,⁸ to protect employees in their right to organize,⁹ and to administer a sweeping new social insurance program.¹⁰

In later years, a different set of public problems led to the formation of new agencies. The imperative of ending racial discrimination led to the creation of the Equal Employment Opportunity Commission (EEOC).¹¹ The Environmental Protection Agency (EPA) was established to protect our clean air and water after rampant pollution—largely the product of industrialization—became a full-blown environmental crisis.¹²

Today, the American regulatory landscape is composed of a diverse set of institutions—agencies, commissions, and executive departments—that, together, seem to sprawl over just about every facet of modern life. We have agencies to promote the safety of our food and drugs,¹³ to manage the airwaves,¹⁴ to control the use of nuclear materials,¹⁵ to ensure fair elections,¹⁶ to protect consumers,¹⁷ and more.

The fact that the administrative state has appeared at so many different times and in so many different guises has made reform and even comprehension of its workings more difficult. Agencies make and enforce policy in such different ways. Several environmental statutes, for instance, require the EPA to establish certain policies via rulemaking procedures,¹⁸

⁸ National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246, 1246 (1934) (Federal Housing Administration).

⁹ National Labor Relations Act, Pub. L. No. 74-198, § 3, 49 Stat. 449, 451 (1935) (National Labor Relations Board).

¹⁰ Social Security Act, Pub. L. No. 74-271, § 701, 49 Stat. 620, 635-36 (1935) (establishing the precursor to the Social Security Administration).

¹¹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258-59 (Equal Employment Opportunity Commission); *see also Pre 1965: Events Leading to the Creation of EEOC*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/history/35th/pre1965/> (last visited Jan. 22, 2017).

¹² Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Dec. 2, 1970), *reprinted in* 5 U.S.C. app. at 698 (2012), *and in* 84 Stat. 2086 (1971) (Environmental Protection Agency); *see also* Memorandum from President's Advisory Council on Executive Organization to President Nixon (Apr. 29, 1970), <https://archive.epa.gov/epa/aboutepa/ash-council-memo.html> (recommending the creation of the EPA); Phil Wisman, *EPA History (1970-1985)*, ENVTL. PROT. AGENCY (Nov. 1985), <https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html> (documenting the origins of the EPA).

¹³ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 393 (2012) (Food and Drug Administration).

¹⁴ Communications Act of 1934 § 1, 47 U.S.C. § 151 (2012) (Federal Communications Commission).

¹⁵ Energy Reorganization Act of 1974 § 201(a), 42 U.S.C. § 5841 (2012) (Nuclear Regulatory Commission).

¹⁶ Federal Election Campaign Act Amendments of 1974 § 208(a), 52 U.S.C. § 30106 (Supp. II 2015) (Federal Election Commission).

¹⁷ Federal Trade Commission Act § 1, 15 U.S.C. § 41 (2012) (Federal Trade Commission).

¹⁸ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 115 (4th ed. 2006); *see, e.g.*, 42 U.S.C. § 7409(a)(1)(A) (2012) (“[The Administrator] shall publish proposed regulations prescribing a national primary ambient air quality standard”); 42 U.S.C. § 7545(k)(1)(B)(vi) (2012) (“[T]he

whereas the National Labor Relations Board (NLRB) makes policy primarily through its adjudicative power.¹⁹ When it comes to enforcement, the EEOC has conciliation and mediation powers, but lacks the authority to formally adjudicate disputes between private parties.²⁰ And sometimes enforcement power is delegated to private parties who can file their own lawsuits, bypassing the administrative state altogether.²¹

It may be worthwhile to take a moment and reflect on why such different administrative models exist. One obvious answer is that each is tailored to meet some industry- or subject-specific need. But another reason may be that the early NLRB-type model probably scared people. Passed at the height of the New Deal when Congress was infatuated with administrative power, large swaths of authority were readily ceded to agencies under the assumption that the agency would then pursue the optimal public good. As revealingly stated by James Landis, former chairman of the Securities and Exchange Commission (SEC), “One the ablest administrators” he ever knew “never read, at least more than casually, the statutes that he translated into reality.”²² Rather, “He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.”²³ The public, I suppose, was left to wonder what limits there are to benevolent agency intentions that have resulted in less than benevolent effects.

III. THE BENEFITS OF THE ADMINISTRATIVE STATE

For all its significant faults, the administrative state originated in the need to safeguard public interests of paramount importance. Given the public interests underpinning the administrative state, should we have faith in the agencies shouldering these immense responsibilities?

Administrator shall promulgate final regulations to control hazardous air pollutants from motor vehicles and motor vehicle fuels”); 42 U.S.C. § 7545(o)(2)(A)(i) (2012) (“[T]he Administrator shall promulgate regulations to ensure that gasoline sold . . . in the United States . . . contains the applicable volume of renewable fuel . . .”).

¹⁹ See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 414 (2010).

²⁰ See *What You Can Expect After a Charge Is Filed*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/process.cfm> (last visited Jan. 22, 2016); *Litigation*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/litigation/index.cfm> (last visited Jan. 22, 2016).

²¹ See, e.g., 15 U.S.C. § 771 (providing a private right of action for violations of Section 5 of the Securities Act of 1933); see also *Pinter v. Dahl*, 486 U.S. 622, 638 (1988) (“Liability under [§ 771] is a particularly important enforcement tool, because in many instances a private suit is the only effective means of detecting and deterring a seller’s wrongful failure to register securities before offering them for sale.”).

²² JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75 (1938).

²³ *Id.*

The problem here is essentially one of allocation: which body is better suited to a task? The administrative state? The Congress? The states? The private sector? Or a mix and combination of some or all of the above? We need to draw up a balance sheet of assets and debits for each of the above entities. That is what I propose to do in rather summary fashion for the administrative state today.

Why is it so important to draw up balance sheets for the above bodies? Because when we draw them up, we begin to look at the exercise of power more rigorously and more skeptically. A balance sheet may also encourage us to cease ceding reflexively so much authority to the administrative state and to examine whether a matter really is best suited to agency capabilities.

To justify the administrative state, proponents offer four virtues—or comparative advantages—of federal agencies: expertise, objectivity, experience, and consistency. As a matter of theory, at least, these virtues explain why we have entrusted administrative agencies with discretion to decide important social and economic questions instead of allocating this authority to other institutions.

But each virtue, in practice, is subject to real caveats. We may have charged the administrative state with safeguarding important and even noble public goods. In achieving these goals, however, agencies do not invariably fare better than the alternatives.

First, agencies are thought to possess the expertise needed to manage the complex economic, scientific, and technological problems facing our country.²⁴ Indeed, it is hard to overstate the extent to which the expertise rationale pervades administrative law, serving as the touchstone for doctrines that allocate power between agencies and other institutions.²⁵ This rationale has genuine validity. The complexity of society is a given. To be unable to call upon a significant reservoir of both public and private sector expertise to deal with this complexity would, among other things, put America at a global competitive disadvantage.

The strength of the expertise justification, however, rises or falls with the need for agency expertise in the first place. For instance, it is easy to see why the work of the EPA requires specialized scientific and technical knowledge. The agency, to regulate effectively, must understand the elaborate, interlocking workings of myriad ecosystems as well as the environmental impact of industrial waste, pesticides, different forms of development, and

²⁴ See, e.g., *id.* at 23 (“With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation . . .”).

²⁵ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

other man-made hazards. The Food and Drug Administration (FDA) similarly requires deep knowledge of the human body and the biological effects of the substances we ingest. We rely upon that expertise to ensure the safety of our food supply and medications. The Nuclear Regulatory Commission must master cutting-edge developments in not just nuclear physics and chemistry, but also medicine and environmental science. The Federal Aviation Administration and National Transportation Safety Board are intended to ensure that air travel is uneventful. An equivalent need for expertise applies with respect to agencies that stabilize the economy, such as the SEC and the Federal Reserve.

It is right that we lament the administrative state's flaws and transgressions. But fairness requires that we recognize as well the benefits its expertise helps deliver: the cleaner air we breathe; the purer water we drink; the safer food we eat and medications we take; the safer trips we take and products we use; the more honest markets in which we invest. The record of administrators is far from perfect in these areas; the means the bureaucracy pursues are often excessive and questionable; the cost and waste and dumb mistakes involved with administrative action are considerable. But Congress and the courts cannot replicate administrative expertise, nor, I think, are the states and private sector fully able to do so. Try to envision the administrative state then as pleasing but far too aggressive shrubbery. Prune it; don't kill it. And try to imagine how you might feel if it were no longer around.

Of course, expertise is no guarantee of anything; sometimes the experts get things very wrong. Sometimes also the need for specialized knowledge is not entirely clear. The Occupational Safety and Health Administration (OSHA), for example, may or may not apply expertise in determining requirements for workplace safety. In other areas expertise may not be as important to the regulatory enterprise. Take the EEOC. Must we resort to some form of specialized knowledge in order to decide whether a particular employment practice is discriminatory? Or consider the NLRB. Does identifying coercive management practices require depths of expertise? Given the Federal Trade Commission's orientation toward the ordinary consumer, how much expertise is involved in discerning unfair or deceptive trade practices? Further, Congress sometimes delegates matters to an agency or commission not for the value of its expertise but because of a legislative inability to overcome political differences or because of structural obstacles

to legislative action in a particular area.²⁶ Perhaps some problems, though important, can be addressed through common sense and ordinary powers of reasoning.

This is not at all to say that the missions of these “lesser-expertise” agencies are unimportant. But in some contexts, specialized knowledge is simply not as critical to the decision-making process. And the agency environment, don’t forget, lacks the democratic input and diverse constituencies that legislative politics affords. Expertise can thus go only so far in justifying the administrative state. We need to ask whether we want a standard of exceptional deference to agencies if there is no comparable need for similarly exceptional levels of agency expertise.

Objectivity is often offered as a second virtue of agency administration. The theory is that administrators, unlike elected officials and private sector employees, will apply their expertise apolitically. On this view, we can trust agencies to examine issues through an impartial lens and resolve problems in our collective best interest, but cannot expect the same from Congress and private companies.

It is true that elected officials face immense pressure to curry favor with campaign contributors and special interest constituencies whose private aims often collide with the larger public good. Similarly, private companies typically cannot be trusted to be impartial, at least on issues that implicate their core financial interests. It would be silly, for example, to expect a cigarette manufacturer to assess objectively the health risks of its product or an oil company to deliver wholly disinterested views on the various forms of renewable energy.

But there is reason to question whether the claimed impartiality of administrative agencies offers a meaningful improvement over elected officials and the private sector. To begin, agencies themselves are vulnerable to capture by special interests. For example, the first independent regulatory board—the Interstate Commerce Commission (ICC)—was criticized throughout the twentieth century for bowing to the railroad industry.²⁷ “The part of wisdom,” one lawyer advised a railroad executive in 1892, “is not to

²⁶ For instance, Congress periodically creates an independent Defense Base Closure and Realignment Commission to handle the delicate politics of recommending which military installations should be closed. See *About the Commission*, DEF. BASE CLOSURE AND REALIGNMENT COMM’N, <http://www.brac.gov/About.html> (last visited Jan. 22, 2016).

²⁷ See Samuel P. Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 *YALE L.J.* 467, 481-505 (1952).

destroy the Commission, but to utilize it.”²⁸ That is a twenty-first century stratagem as well: witness the alleged regulatory capture of the Drug Enforcement Administration by a pharmaceutical industry eager to keep prescriptions of highly addictive painkillers widely available.²⁹

Just as the barnacles of interest group politics attach to our elected representatives through campaign contributions, so do they cling to administrative agencies, albeit in slightly different ways. Regulated entities often possess significant lobbying resources, and their lobbying efforts can result in potentially compromising relationships with agency personnel. And only a naïf would believe that interest groups do not attempt to place their own advocates in top bureaucratic positions by influencing the political appointment process.

Moreover, agency staff positions often attract applicants with an agenda. This is not to say that civil servants are not dedicated or hardworking, because so many of them are. Moreover, their agenda is often the product of sincere conviction. It is hard to fault people with strong views on civil rights, the environment, or labor relations for seeking out agencies that deal with those subjects. At the same time, however, in light of their preexisting leanings and perspectives, many civil servants cannot be expected to serve with inhuman detachment. They have many of the same biases and preconceptions as their private counterparts.

Given these different cross-currents of political influence, we should be skeptical about the oft-repeated claim that agencies are disinterested decision-makers. From the top officials to the civil servants who staff the ranks of the federal bureaucracy, administrative agencies cannot escape the grasp of politics. The additional downside is that agencies lack the electoral accountability and multiple constituencies that actual political life affords.

The third asserted virtue of the administrative state is experience. Distinct from expertise, experience is gained through repeated exposure to the same problem day after day, month after month, year after year. A physician reviewing new drugs at the FDA, for instance, has medical expertise before he or she even starts, but will gain experience only after time on the job.

Agencies can use their experience to reach better outcomes and to regulate more efficiently. Long-time civil servants—people who have worked in government for twenty or thirty years—encounter the same

²⁸ MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 265 (1955) (quoting Letter from Richard Olney to Charles Perkins (Dec. 28, 1892)).

²⁹ See Editorial, *Locating Blame in the Opioid Epidemic*, WASH. POST, Oct. 30, 2016, https://www.washingtonpost.com/opinions/is-the-dea-partly-to-blame-for-the-opioid-epidemic/2016/10/30/2fd5dc30-9c78-11e6-b3c9-f662adaa0048_story.html.

problem again and again, drawing on their familiarity with the benefits and disadvantages of solutions they have tried before. This experience allows agencies to select better solutions and to solve problems faster than they could with expertise alone. They don't need to reinvent the wheel. In that sense, agencies may save us money. For many reasons, the pending mass departure of long-time government workers in their 50s and 60s threatens a serious depletion of talent in the administrative ranks.

But there are downsides to experience as well. Familiarity with a problem can lead to complacency. An experienced civil servant might choose one solution because he or she has always done so, not because it is necessarily the best option. For example, the FDA has been criticized for demanding large, placebo-controlled clinical trials. This fixation on requiring one type of clinical trial can prevent drugs intended to treat rare diseases (for which a large clinical trial may be impractical) or drugs from small biotech companies (which may not be able to afford a large clinical trial) from making it to market. This is the case even when a small trial may provide sufficient evidence of the drug's efficacy.³⁰

The risk of complacency is further aggravated by the civil service protections that came about as an admirable attempt to protect the professionalism of the public workforce, but have evolved to shield those lacking in competence as well. Agency employees sometimes rise through the ranks simply by doing the minimum, knowing they can be fired only for good cause. The combination of experienced and risk-averse employees can stifle bureaucratic innovation.

A fourth asserted virtue of public administration is its ability to promote consistency. Agencies, as centralized decision-makers, can allegedly create uniform rules and apply them consistently across the country. The more decentralized structure of the judicial system, by contrast, is said to contribute to a lack of uniformity in the corpus juris by allowing courts to render decisions inconsistent with those of courts in other states and regions.

Consistency is also touted as a byproduct of an agency's experience. Specialized agencies encountering the same problems are likely to reach the same outcomes, and civil servants working across administrations can ensure that rules are applied consistently over time. Federal courts, on the other hand, are generalist by design. They have only episodic encounters with any given subject matter, which can result in decisions in tension with

³⁰ See, e.g., Opinion, *Mental Dystrophy at the FDA: How the Bureaucracy Denies a New Drug for a Deadly Disease*, WALL ST. J. (Apr. 28, 2016, 7:19 PM), <http://www.wsj.com/articles/mental-dystrophy-at-the-fda-1461885588>.

earlier decisions of the same court. Agencies' centralization and experience are thus claimed to bring about a level of consistency that advances the basic rule of law values of clarity and predictability.

But as with expertise, objectivity, and experience, the administrative state's capacity to deliver consistent outcomes—either through adjudication or notice-and-comment rulemaking—is far from perfect. To begin with, many agencies with adjudicative authority have a record of rendering inconsistent decisions. The NLRB, for instance, has waffled back and forth on the question of whether graduate students qualify as employees under the National Labor Relations Act. The Board first ruled that graduate students were not employees,³¹ but later reversed course.³² Only a few years after that, the Board reversed itself yet again.³³ And this August, the Board changed its position a third time, ruling that graduate students count as employees.³⁴ These outcomes seem to depend on the composition of the Board: Democrats have been in control when the Board has ruled that graduate students were employees, and Republicans have been in control when it has gone the other way.³⁵

This example is far from an isolated occurrence, and inconsistent adjudications are not confined to politically sensitive agencies like the NLRB. As another example, an exhaustive study of immigration judges' treatment of asylum applications found a wealth of divergent outcomes.³⁶ The study concluded that these results could not be explained solely by factual distinctions between the cases.³⁷ Administrative adjudications have, to put it mildly, not always created a seamless, coherent body of law.

Further, inconsistency is not just a feature of agency adjudication. Even policies promulgated through notice-and-comment rulemaking can be inconsistent over time. To take just one example, the Department of Labor's regulations on migrant workers have alternated between favoring, on the one hand, employers seeking less expensive labor and, on the other, employees seeking higher wages.³⁸ Seminal administrative law cases like *Motor*

³¹ Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974).

³² New York Univ., 332 N.L.R.B. 1205 (2000).

³³ Brown Univ., 342 N.L.R.B. 483 (2004).

³⁴ Columbia Univ., 364 N.L.R.B. 90 (2016).

³⁵ *Members of the NLRB Since 1935*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Jan. 22, 2016).

³⁶ *Immigration Judges*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/immigration/reports/160/> (last visited Jan. 22, 2016).

³⁷ *Id.*

³⁸ See *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 771-72 (4th Cir. 2012) (Wilkinson, J., concurring).

*Vehicle Manufacturers Ass'n v. State Farm*³⁹ and *FDA v. Brown & Williamson*⁴⁰ address more examples of agencies reversing their earlier positions.

The consistency of both administrative adjudication and rulemaking thus leaves something to be desired. This does not mean that agencies are less consistent than other institutions. It would be unreasonable to expect civil servants to transcend the realities of governance in a contentious democracy. Still, while consistency—like expertise, objectivity, and experience—is a virtue of the administrative state in theory, the ideal is not always realized in practice. This brings us again to the larger point. None of us should swallow the asserted virtues of the administrative state whole. These virtues, while often valuable and real, come with large caveats which even the most ardent exponents of administrative governance should in all candor acknowledge.

IV. THE PERILS OF ADMINISTRATIVE POWER

Whatever the perceived benefits of the administrative state, they have not come without large costs. The most obvious danger of the administrative state is that it combines elements of legislative, executive, and judicial power, and the fact that it can on any given day exercise any one of these powers makes its threat to liberty unique.

But I want to put the overarching fear of tyranny aside for the moment and focus on a few of the more subtle, lower-case tyrannies of present administrative practice. In their own way, these seemingly petty tyrannies constitute real burdens on individual Americans and American society as whole. I see five burdens worth briefly mentioning.

First, the administrative state often regulates in too much detail. One of the benefits of lawmaking by Congress and state legislatures is that these bodies more often prescribe rules at a relatively high level of generality. Legislation can of course be quite specific, but the approximately 180,000 pages of the Code of Federal Regulations⁴¹ are far more likely to tackle such granular questions as whether the primary sulphur dioxide air quality

³⁹ *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁴⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁴¹ CLYDE WAYNE CREWS, JR., COMPETITIVE ENTERPRISE INSTITUTE, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 22 (2016), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202016%20-%20May%204%202016.pdf>.

standard should be changed to seventy-five parts per billion.⁴² Not to be left out, the Department of Labor has also been involved in a back-and-forth, excruciatingly microscopic effort to determine whether mortgage-loan officers qualify as administrative employees under the Fair Labor Standards Act (FLSA).⁴³ The organic legislation often permits but in no way requires regulators to direct in minute detail the lives of those they regulate. In the name of precision, however, the regulators often steal the last ounce of residual discretion from the regulated person or enterprise. The stifling detail seems almost designed to show America beyond the Beltway just who's boss.

Second, the administrative state often changes its regulations too frequently and too capriciously. This second burden stems in part from the first burden—that administrative regulations are crushingly detailed. When you have highly detailed regulations, it can be tempting to continually tweak them to get them just right. But with each such tweak, the regulators change the rules of the game, if ever so slightly—and no one likes that.

Of course, allowance for change makes agencies less sclerotic and more responsive to the political will. And that is a good thing. But any regulated institution, public or private, relies on a measure of predictability to plan for the future. A constantly churning regulatory environment makes this kind of medium- and long-term planning very difficult. One need only recall the Department of Labor's dizzying back-and-forth on the rules for aliens temporarily employed in the agricultural sector and our logging industries to appreciate the point.⁴⁴

The frequency with which administrators change the rules is related to the way in which they change them. Notice and comment requirements once ensured a modicum of public input into administrative rule changes, but now administrators often dodge notice and comment entirely. They use "guidance documents" or "interpretative rules" to make "policy statements" that, though not technically binding, might as well be when viewed from the perspective of a regulated party.⁴⁵

⁴² See National Primary Ambient Air Quality Standards for Sulfur Oxides, 40 C.F.R. § 50.17 (2016).

⁴³ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

⁴⁴ See, e.g., Jessica Shaver, *Obama Administration Changes to H-2A Visa Program: A Temporary Fix to A Permanent Problem*, 24 GEO. IMMIGR. L.J. 97 (2009).

⁴⁵ See Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992) (commenting that "agencies often inappropriately issue [nonlegislative rules] with the intent or effect of imposing a practical binding norm upon the regulated or benefited public"); see also H.R. REP. NO. 106-1009, at 1 (2000) ("Regrettably, the committee's investigation found that some guidance documents were intended

A third burden of the administrative state is one of unbearable backlog and delay. This is not all the fault of administrators by any means—Congress is all too willing to set ambitious tasks for agencies, but unwilling to budget in a manner that will allow agencies to accomplish them. Unfunded mandates and ever-increasing workloads result. Whatever its cause, agency backlog is a real problem. In a case the Fourth Circuit heard earlier this year, a hospital complained about delays in processing its Medicare reimbursement appeals. The Secretary of Health and Human Services, meanwhile, admitted that the system had a backlog of 800,000 such appeals, which would take more than ten years to handle at current staffing levels.⁴⁶ And yet this is not, unfortunately, an isolated case. The EEOC has a backlog of 75,000 uninvestigated complaints.⁴⁷ And over a million people are awaiting adjudication of their applications for disability benefits from the Social Security Administration.⁴⁸

The delay is often exacerbated by multiple levels of administrative review. Multi-level review is often beneficial to a claimant, but the trek of, say, a disability claimant from a hearing officer to an ALJ to the Social Security Appeals Council to federal court can generate prolonged uncertainty and considerable cost.⁴⁹

Delay is one thing, but monetary costs are another. A fourth burden of our administrative state is its huge financial impact on the economy. The 2015 version of the Federal Register was 80,260 pages long.⁵⁰ Estimates of the total yearly cost of all this regulation to our economy have ranged from \$68.5 billion to over \$2 trillion,⁵¹ but whatever the true number, it's a lot.

While many regulations target pressing social problems, the aim cannot always be perfect. Regulations meant for banks too big to fail sometimes

to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such 'backdoor' regulation is an abuse of power and a corruption of our Constitutional system.'").

⁴⁶ *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 50-51 (4th Cir. 2016).

⁴⁷ Kevin McGowan, *EEOC Officials Respond to GOP Criticisms During Senate Committee Oversight Hearing*, Daily Lab. Rep. (BNA) (May 19, 2015), <http://www.bna.com/eec-officials-respond-n17179926736/>.

⁴⁸ Henry Aaron & Lanhee Chen, *How to Fix the Backlog of Disability Claims*, POLITICO (Mar. 1, 2016, 5:22 AM), <http://www.politico.com/agenda/story/2016/03/how-to-fix-the-backlog-of-disability-claims-000056>.

⁴⁹ See *Hill ex rel. J.R.W. v. Comm'r of Soc. Sec. Admin.*, No. 4:12CV599, 2015 WL 1288771, at *1 (E.D. Tex. Mar. 20, 2015).

⁵⁰ Crews, *supra* note 41, at 18.

⁵¹ MAEVE P. CAREY, CONG. RESEARCH SERV., R44348, METHODS OF ESTIMATING THE TOTAL COST OF FEDERAL REGULATIONS (2016), <https://www.fas.org/sgp/crs/misc/R44348.pdf>.

snare smaller banks serving local communities,⁵² and regulations meant to ensure that our pharmaceuticals are safe sometimes actually impede their manufacture.⁵³ Regulation is necessarily a dragnet, and the costs imposed on unintended targets can be considerable.

It is worth remembering, of course, that the costs of regulation include more than just compliance costs on the part of private parties. There are also the immense costs of creating and enforcing so many rules—the cost of supporting our vast federal bureaucracy. Every new administrative position is another salary that must be paid—paid out of the pockets of taxpayers with money now denied other purposes.

Fifth and finally, any list of bureaucratic woes would be incomplete without one last great ill: that of imperiousness, an attitude that can affect anyone entrusted with a little bit of authority. Sometimes those on the inside of a bureaucracy can be maddeningly indifferent to the effects that prolonged delays and harassing requests have on those outside the bureaucratic walls. Sometimes administrators just jerk people around. In one unfortunate story, the NLRB filed suit against Boeing for locating a jet manufacturing plant in South Carolina rather than in Washington State.⁵⁴ The litigation was dropped only after Boeing struck a deal to raise union wages and increase production in Washington.⁵⁵ And in a different case, the EEOC filed a lawsuit against a company in which the agency's claims on behalf of 67 employees were dismissed because of the EEOC's total failure to comply with its statutory duty to investigate them.⁵⁶ The dispute has droned on for nine years, and the litigation over attorney's fees is still ongoing.⁵⁷

I don't want to overdo the point. There are unquestionably many people of good will and exceptional talent within the administrative state. We are fortunate to have them. But when you give someone a hammer, as the saying goes, everything risks becoming a nail. When a federal court orders you to do something you do not like, well, at least the judge was appointed and confirmed. When Congress passes a disagreeable law, well, at least the lawmakers were elected. But when mid-level administrators drag people and

⁵² See Alan J. Wilson, Note, *There Goes the Neighborhood: Regulating Away the Community Bank – An Analysis of the Costs of Current Regulations on Community Banks*, 116 W. VA. L. REV. 463, 477 (2013).

⁵³ See W. Nicholson Price II, *Making Do in Making Drugs: Innovation Policy and Pharmaceutical Manufacturing*, 55 B.C. L. REV. 491, 495 (2014).

⁵⁴ Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html>.

⁵⁵ *Id.*

⁵⁶ See *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1647-51 (2016).

⁵⁷ *See id.*

institutions through a slew of unnecessary muck, the system inculcates cynicism and estranges people from their government. To put the point bluntly, Americans too often sense, and rightly so, that the administrative state has become a law unto itself.

V. RESTORING THE BALANCE

The above calculus of benefits and burdens suggests a more cautious course than constitutional demolition of the administrative state as it now exists. That would be to throw the baby out with the bath water. On the other hand, the cumulative problems with the administrative state have grown so large that to rock along with the status quo would verge on legal or judicial malpractice.

So what is to be done? To help answer this question, let's take the briefest of looks at the relationships between the administrative state and the executive, legislative, and judicial branches. In considering how to reform the administrative state, each branch should consider the benefits and burdens discussed earlier. These form a basis for evaluating proposed reforms: reforms should mitigate the above drawbacks of agency action while advancing its virtues.

Because the executive, legislature, and judiciary have such different relationships to the administrative state, each branch is uniquely positioned to promote some benefits and respond to some problems. But no branch can achieve the necessary reform on its own.

The catalogue of reform proposals is well-known, and I do not propose in the course of a brief essay to review the pros and cons of each of them. As for the executive, reform includes making the curbing of administrative overreach a more prominent criterion in top political appointments. The Trump Administration's top choices at the FDA, the EPA, and the Departments of Education, Energy, Health and Human Services, Housing and Urban Development, Labor, and Treasury, to name just a few, have appeared at least at first blush to be much more skeptical of overregulation and more reliant on market forces than their predecessors. Whether a change in direction is actually accomplished or whether it all turns out to be a big fizzle is as yet unclear. However, bringing a fresh pair of eyes to agency operations and subjecting regulatory actions to more rigorous, centralized cost-benefit analysis may help to place the far-flung actions of the administrative state under a modest measure of control. Perhaps with Congress's help, the executive branch could pursue operational improvements as well. Potential initiatives might include prioritizing

managerial experience in political appointees, equipping agencies with up-to-date technology, streamlining the hiring process (allegedly over three times as long as in the private sector), and enhancing the government's capacity to address subpar performance.⁵⁸

As for the legislative branch,⁵⁹ narrower, more precise delegations would often seem preferable to the present impulse to vest agencies with unfettered administrative power,⁶⁰ especially in those areas where technical expertise is not critical. Using private mechanisms of enforcement and affording private parties options and alternative means of achieving statutory goals is also worth exploring. In 1996, Congress passed the Congressional Review Act, allowing disapproval of agency regulations by simple majority vote.⁶¹ There is now a proposal to supplement that legislation with the Regulations from the Executive in Need of Scrutiny Act that would require any regulation whose economic effect exceeded \$100 million to be submitted to a vote of Congress,⁶² a change with especially profound implications for environmental protections.

As to the judicial branch, might the reflexive deference of the *Chevron* standard be profitably confined to those instances where administrative expertise actually warrants *Chevron* respect? One of the problems with *Chevron* is that it is a one-size-fits-all standard. But there is really no typical agency, just a collection of entities with very different features and characteristics. In addition, is the proper question whether an agency interpretation of a legal provision is merely reasonable or whether it is actually right? Surely courts can interpret statutes and regulations as well as agencies. It's what we do. As a final matter, Congress and the courts might make attorney's fees more available to private parties who have suffered from agency incompetence or abuse.

The above is a most incomplete catalogue of reforms. Each suggestion has its pros and cons, and each could occupy a worthwhile conference by

⁵⁸ Max Stier, Opinion, *Trump's Hiring Freeze Will Do the Opposite of What He Wants*, WASH. POST, Jan. 23, 2017, https://www.washingtonpost.com/opinions/trumps-hiring-freeze-wont-fix-government-it-will-do-the-opposite/2017/01/23/d325fbfa-e1af-11e6-a547-5fb9411d332c_story.html.

⁵⁹ See generally MIKE LEE, OUR LOST CONSTITUTION: THE WILLFUL SUBVERSION OF AMERICA'S FOUNDING DOCUMENT (2015).

⁶⁰ See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015) (arguing that broad delegations undermine Congress as an institution by empowering individual members to pursue their goals by influencing administrative agencies rather than legislating collectively).

⁶¹ Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868-74.

⁶² H.R. 427, 114th Cong. (2015).

itself. I certainly do not propose to take them up today. I make no more than the modest suggestion that reforms be gauged against the calculus of benefits and burdens in the preceding sections. That way we can better tell when the administrative state is a definite boon to our public life and when it decidedly is not.

As the recent dialogue between Philip Hamburger and Adrian Vermeule demonstrates, the old debate on the constitutionality of the administrative state rages on.⁶³ Scholars have launched a three-pronged attack, arguing that the administrative state entails an unconstitutional delegation of lawmaking power to the executive, that agencies housed in the executive branch cannot possess rule-making and/or adjudicative authority, and that, more generally, the consolidation of executive, legislative, and judicial power within any unit or branch of government would violate the separation of powers and risk absolutism.

This debate, while theoretically insightful and fascinating, becomes problematic in practice. These critiques are so far-ranging that they would seem, if followed logically, to require a complete dismantlement of the administrative state. But it is not precisely clear how such a dismantlement and the subsequent reallocation and redistribution of power would play out. Having courts declare all this unconstitutional begs the question: what next? I am skeptical of the wisdom of a radical restructuring engineered by the judiciary through constitutional interpretation—it would, in effect, amount to an effort by one democratically unaccountable institution to reform another. There is reason to be wary of such a struggle of the unaccountables.

While a powerful academic attack is being mounted against the administrative state, the political case has failed to keep pace. Without both, there is little realistic prospect for reform. Fundamental reform must be pursued by democratically accountable institutions, at least in significant part. The case for reform needs political energy, not just theoretical and intellectual energy, even of the highest sort.

I do not underestimate for a minute the challenge of building such a case. Businesses, large and small, may groan under the regulatory burden. They understand how it can drive up overhead and hold down employment. But for the average citizen, aside from taxes and entitlements (which may in some very rough sense lead to offsetting perceptions), the administrative state remains an abstraction. The political case will have to make the

⁶³ See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Adrian Vermeule, *No*, 93 *TEX. L. REV.* 1547 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)).

drawbacks of administrative governance more concrete. One might start by saying simply this: the administrative state means never being able to reach a real person on the telephone.

The question is how to curb the administrative state without huge collateral damage. Rather than smashing the issue with a constitutional sledgehammer, is there some step short of a broadside attack? Do federalism and separation of powers challenges to agency authority always need to be abstract? Consider, for example, the application of FLSA wage and overtime standards to employees in state and local government. The agency's "rulemaking," to use the favored term, seems plainly a legislative act in that it sets a binding general standard to be applied in particular situations.⁶⁴ Furthermore, when the regulated entity is either a state or local government it raises federalism concerns. These regulations are excruciatingly detailed and require compliance recordkeeping beyond the point of headache.

Do these factors in combination warrant an invalidation of these FLSA regulations on separation of powers or federalism grounds? The Supreme Court in *National League of Cities v. Usery*⁶⁵ attempted an invalidation of such regulations but that effort eventually failed by one vote.⁶⁶ Should we wish to revive that decision? It may seem a tempting prospect, but the question remains: What criteria should be applied in evaluating regulations? Courts would need some rule for particularized regulatory invalidations that is more than ad hoc.

The best response to our oversized administrative state may be more prosaic. As I have noted, a big part of the problem lies in the absence of congressional and judicial will to exercise the powers those branches already possess. Both Congress and the courts avoid hard questions—Congress through broad and scarcely monitored delegations and the courts through genuflection to agency behavior, even where agency action is ultra vires or just plain old abusive. The lesson for both branches is easy to state but devilishly hard to follow: use what power has been given you.

I have concentrated here on the administrative state's encroachments on the different branches of government, but in so doing I would not want to leave the impression that the administrative state did not work similar distortions between the public and private sectors. We seek both a robust private sector and a large administrative apparatus because our society does

⁶⁴ See generally Christopher DeMuth Sr., *Our Voracious Executive Branch: On the Nature and Causes of Executive Government*, WKLY. STANDARD, June 27, 2016, at 18.

⁶⁵ *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁶⁶ See *Garcia*, 469 U.S.

not fully trust either. The private and public sectors can function in modern life as a check and balance all their own, one that Madison might have thought of had he been dropped into this environment. Are regulated entities more subjects or partners? The problem is that the noose around the private sector grows ever tighter and the checks on the bureaucratic apparatus seem ever looser. The same is true of the federal-state relationship. In some areas of administrative law, it is very much a cooperative one. In others, the states are essentially taking dictation. We need less of that.

Each of these topics is a vast subject in itself, one that would occupy many conferences over many months. Acknowledging yet again that I have barely scratched the surface, I can conclude at least this much: To condemn the entire administrative state as an unconstitutional exercise of authority is to ignore the considerable benefits it confers, to overlook the efficacy of intermediate measures for reform, and to neglect the hard but essential work of building a political case. But things badly need to be brought back into balance, both within the federal government, within our federal system, and with respect to private parties.

In each of these areas, the balance is all out of whack. In theory, the three existing branches of government were to check the administrative state. The executive through its appointment power, but that has only imperfectly worked out. The Congress through its delegation, appropriation, and oversight powers, but that has only imperfectly worked out. The courts through their power of judicial review, but that check too has proven an imperfect one. So the administrative state has been left rather substantially to its own devices. For all its benefits, the great casualty of its growth has been democratic governance. The gap between governor and governed grows ever wider, and how we restore some slight sense of popular sovereignty in this opaque and complicated world is worth many a good discussion. That is why I applaud such conferences as you have convened today. Thank you for allowing me to share my thoughts.