THE ATTACK ON ADMINISTRATIVE REGULATION

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Probably since the first instance in which Congress considered giving a federal agency the authority to regulate private conduct, those subject to regulation have attempted to avoid such regulation. One objection has been that the subject should not be regulated—regulation kills jobs, investment, innovation, etc.[1] A less direct attempt has been to impose procedural requirements on adopting any regulation or order; such procedures would slow the adoption of a regulation or order and perhaps, by raising the cost of adopting it, dissuade the agency from proceeding altogether.[2] The origins of the Administrative Procedure Act reflect this approach,[3] and current proposals to increase the procedural requirements for rulemaking continue this strategy.[4] Few, however, have attacked the legitimacy of administrative regulation altogether.

Although the Supreme Court's use of the Nondelegation Doctrine in *A. L. A. Schechter Poultry Corp. v. United States*[5] and *Panama Refining Co. v. Ryan*[6] was a temporary attack, in that those opinions undermined the ability to delegate regulatory responsibilities to agencies, the opinions were limited and were subsequently interpreted in a way that effectively allows very broad delegations.[7] More recently, however, there has been a concerted

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1. *President Trump Eliminates Job-Killing Regulations*, WHITE HOUSE (Mar. 30, 2017), https://www.whitehouse.gov/blog/2017/03/30/president-trump-eliminates-job-killing-regulations.

2. *See infra* Part IV (discussing a series of Executive Orders limiting administrative power).

3. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1678 (1996) (stating that the APA was "a compromise of a battle over conservatives' attempts to hinder liberal administration programs by limiting the power of agencies to implement the programs").

4. *See, e.g.*, The Regulatory Accountability Act, S. 951, 115th Cong. (2017) (calling for reform of federal rulemaking processes).

5. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 518 (1935).

6. Panama Ref. Co. v. Ryan, 293 U.S. 388, 432 (1935).

7. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001) (acknowledging the Court is loath to second guess Congress on how much authority it delegates to agencies).

effort arising in the academy, Congress, and the courts to undermine agency regulation as fundamentally illegitimate—if not unconstitutional.[8] Whether this effort will ultimately prevail is questionable, but this new and expanding attack deserves recognition.

I. THE ACADEMY

Philip Hamburger and Gary Lawson are probably the two leading figures challenging the root and branch of administrative law.[9] Professor Hamburger's book, *Is Administrative Law Unlawful?*, argues that any agency regulation that regulates private conduct and any agency adjudication that impacts private liberty or property is unlawful.[10] Based upon his reading of early English law, Hamburger believes that only the "legislative power" vested in Congress may be used to regulate private persons, and only the "judicial power" vested in the courts may be used to issue binding adjudications.[11] The "executive power" cannot command or prohibit private conduct; it can only manage the government fisc and property, and bring actions in courts to enforce the law.[12] Thus, Hamburger finds an absolute nondelegation doctrine: Congress cannot delegate the power to agencies to adopt regulations that give flesh to statutes that Congress passed.[13] Only Congress itself can create the binding norm.[14] In addition, judicial review of agency adjudication does not satisfy the need for the exercise of the judicial power to bind individuals. This is because, on the one hand, it does not satisfy the right to a jury trial and, on the other hand, the courts defer to agency decisions using the substantial evidence doctrine or the *Chevron* and *Auer* doctrines, rather than exercising their own "judicial power."[15] Hamburger's vision would eliminate all the

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8. *See* Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1871–72 (2016) (identifying issues arising within interbranch relations with which academics and courts grapple).

9. *Gary S. Lawson*, BOS. U. SCH. L., http://www.bu.edu/law/profile/gary-s-lawson/ (last visited Apr. 12, 2018); *see* Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 782 n.84, 817 (2016) (referring to Hamburger's contributions to American administrative law).

10. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1–2 (2014) (comparing administrative law developments with the danger of off-road driving).

11. *Id.* at 8.

12. *Id.* at 293.

13. *Id.* at 378.

14. *Id.* at 402.

15. *Id.* at 239, 242–44, 248; *see, e.g.*, Auer v. Robbins, 519 U.S. 452, 461 (1997) (explaining that an agency's interpretation of its own rules is controlling unless "plainly erroneous or inconsistent with the regulation"); Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951)

independent regulatory agencies as well as all health, safety, and environmental regulation in the executive branch.[16]

Neither the details of how Hamburger arrives at these conclusions nor the substantive validity of his history and conclusions are my subject.[17] My point is that Hamburger's radical thesis—that virtually all modern administrative law is illegitimate—has not simply been dismissed, but has been taken seriously. Perhaps a review of it in the Wall Street Journal gave it special publicity, but, in addition, there have been symposia on the subject,[18] as well as numerous individual law review articles addressing his thesis.[19] Moreover, his book has been cited favorably by two Supreme Court justices,[20] as well as by lower court and state judges.[21]

Professor Lawson reaches much the same conclusion, if by a slightly different path, despite, or perhaps due to, being the author of one of the

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(explaining that the Court will uphold the findings of the board if supported by evidence that "a reasonable mind might accept as adequate to support a conclusion"); Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining that the Court defers to an agency when Congress's intent was unclear and the agency's interpretation is reasonable).

16. *See* HAMBURGER, *supra* note 10, at 244–45 n.k (stating the constitutional right to a jury applies to all criminal cases, including administrative equivalents—thereby limiting quasi-legislative agency functions).

17. *See, e.g.*, Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521, 1522, 1545 (2015) (reviewing HAMBURGER, *supra* note 10) (endorsing Hamburger's overall message while pointing out questions that Hamburger leaves unanswered); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1548 (2015) (reviewing HAMBURGER, *supra* note 10) (describing the book as "dystopian constitutional fiction").

18. *See, e.g.*, Erin Morrow Hawley, *Exploring the Administrative State*, 81 MO. L. REV. 933, 934 (2016) (presenting a brief introduction to the administrative state for the symposium "A Future Without the Administrative State?"); Symposium, *Presidential Power and Administrative Law*, 86 UMKC L. REV. (forthcoming 2018) (compiling papers on the executive branch's power); *see also Administrative Law*, ASS'N AM. L. SCHOOLS, https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=a66e3d5a-cb06-4a1d-a24e-50f32d15c2f2 (last visited Apr. 12, 2018) (providing the program for the annual event focusing on Administrative Law).

19. *See, e.g.*, David E. Bernstein, 33 L. & HIST. REV. 759, 759 (2015) (reviewing HAMBURGER, *supra* note 10) (supporting Hamburger's conclusions); *see also* Lawson, *supra* note 17, at 1521 (supporting and expanding upon Hamburger's conclusions).

20. *See* Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1242–43 (2015) (Thomas, J., concurring) (referencing Hamburger's article on two separate occasions); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (referencing Hamburger's article to reiterate the importance of the judiciary's role in interpreting statutes).

21. *See* Egan v. Del. River Port Auth., 851 F.3d 263, 281 n.4 (3d Cir. 2017) (Jordan, J., concurring) (pointing to Hamburger's analogy that agencies creating binding law could be a remnant of British monarch powers); Howell v. McAuliffe, 788 S.E.2d 706, 720 n.12, 721–22 (Va. 2016) (outlining Hamburger's point that absolute royal powers fueled the American Revolution); U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 407 (D.C. Cir. 2017) (per curiam) (highlighting Hamburger's astonishment that agencies have the power to disregard statutory requirements).

leading administrative law casebooks.[22] Lawson authored *The Rise and Rise of the Administrative State* in 1994, in which his opening sentence declared: "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."[23] Rather than rely on ancient English history, Lawson relies on his view of the original public meaning of the Constitution, which includes a drastically narrower conception of the federal government's legislative powers; the Necessary and Proper Clause; and Congress's power to "delegate" discretionary decisions to the executive—and a much broader view of the unitary executive.[24] Lawson makes much of the vesting clauses as a source of power and as a restriction on power not vested, leading to his narrow version of what Congress can delegate to agencies and what agencies can adjudicate.[25]

Again, neither the details nor the validity of Lawson's arguments are my subject. Rather, it is the influence that his vision has had. Because his article in the Harvard Law Review was a little early in this new revolution, it did not create as big a splash as Hamburger's more recent book.[26] Nevertheless, Lawson's article had a significant influence on a rising generation of academics associated with the Federalist Society.[27] Although

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22. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 6 (7th ed. 2016); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 12 n.51, 42 n.222 (2017) (referring to Lawson's *Federal Administrative Law* work as a leading text).

23. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

24. *See id.* at 1243–44 (examining the ability of the Executive to replace the decisions of agency officials); *id.* at 1231 n.1 (explaining that using the original public meaning is the best way to interpret the Constitution); *id.* at 1233 (bemoaning the breadth of Congressional legislative authority, decrying Congress's tendency to delegate authority, and lamenting the independence of administrative bodies from executive control); *id.* at 1242 (discussing the concept of unitary executive power).

25. *See id.* at 1238 (explaining the limits that the vesting clause places on the branches of government, particularly focusing on the delegation of legislative authority to the executive branch).

26. *Compare* Ilya Somin, *Will Philip Hamburger's Critique of Administrative Law Follow in the Footsteps of Richard Epstein's Work on Takings?*, WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/will-philip-hamburgers-critique-of-administrative-law-follow-in-the-footsteps-of-richard-epsteins-work-on-takings/?utm_term=.c6ce38c999a1 (portraying Hamburger's book as a major milestone, shifting opinions away from the delegation of authority to administrative agencies), *with* Ronald Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, HERITAGE FOUND. (Nov. 20, 2007), https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited (outlining the history of administrative law scholars and Lawson's early work that influenced later major developments, such as Hamburger's).

27. For example, Lawson influenced John McGinnis, Michael Rappaport, Bradford R. Clark, Steven Eagle, Aaron Nielson, Sai Prakash, and Caleb Nelson. *See* Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 361 (2017) (interpreting Lawson's argument to mean that

they are only two academics and clearly have had less impact on actual administrative law than a number of other academics who accept the administrative state, their arguments that once might have been dismissed out of hand are now taken seriously enough that those who accept them are no longer a fringe group.[28]

II. CONGRESS

Republicans in the House of Representatives have, for a number of years, passed bills to reform the regulatory process. Occasionally, they have succeeded.[29] These efforts, however, were almost all simply about imposing new procedural requirements on rulemaking.[30] One exception was the Congressional Review Act in 1996 (CRA).[31] A delayed response to the Supreme Court's decision in *INS v. Chadha*, which invalidated the legislative veto, the CRA requires agencies to send final rules and associated cost-benefit analyses to Congress before the rules take effect; then, within a set period of time, Congress may adopt a joint resolution disapproving of the rule.[32] For twenty years this provision was virtually

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"agencies are in fact routinely exercising legislative and judicial power as well, undermining the constitutional separation of powers").

28. *See* Peter J. Wallison, *Decentralization, Deference, and the Administrative State*, NAT'L AFF. (2016), https://www.nationalaffairs.com/publications/detail/decentralization-deference-and-the-administrative-state (stating that the support for the deconstruction of the administrative state, as indicated by Hamburger, comes from modern conservatism); *see also* Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFF. (2015), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state (outlining the growing support for questioning the administrative state in the judicial branch); David French, *Trump Wants to Deconstruct the Regulatory State? Good. Here's How You Start*, NAT'L REV. (Feb. 24, 2017), https://www.nationalreview.com/2017/02/administrative-state-deconstruction-trump-steve-bannon-cpac/ (stating the new executive administration also supports "the deconstruction of the administrative state"); *Contributors: Prof. Philip A. Hamburger*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/philip-hamburger (last visited Apr. 12, 2018) (demonstrating that Hamburger has strong ties to the Federalist Society); *Contributors: Prof. Gary Lawson*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/gary-lawson (last visited Apr. 12, 2018) (demonstrating that, like Hamburger, Lawson is also associated with the Federalist Society).

29. *See, e.g.*, Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 (2012) (serving as an example of a law that began as a Republican-backed bill); Unfunded Mandates Reform Act of 1995, 5 U.S.C. § 3109 (2012) (providing an additional example of a law that began as a Republican-backed bill geared toward regulatory reform).

30. *See* 5 U.S.C. § 601 (serving as an example of one of the new procedural requirements this Act imposes on rulemaking).

31. Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

32. *Id.* § 801(a)(1)(A); *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (holding that the congressional veto provision in § 244(c)(2) is unconstitutional).

unused,[33] but in 2017, with a Republican House, Senate, and President, Congress disapproved of 14 regulations.[34] Unlike other regulatory reform actions that require more procedure of agencies before they adopt regulations, but leave the authority in the agency to adopt rules, the CRA is a mechanism to take administrative power away from agencies on a regulation-by-regulation basis.[35] That is, no matter that the agency has adopted a regulation that is authorized by law and adopted according to the procedures required by law, Congress may, for wholly political reasons, veto the regulation.[36] Moreover, once Congress has disapproved of a particular regulation, the agency is deprived of authority to later adopt another regulation that is "substantially the same."[37]

Even with the spurt of CRA actions in early 2017, the CRA is still only a minor revocation of agency authority.[38] Waiting in the wings, however, is a much greater revocation—the Regulations from the Executive in Need of Scrutiny Act (REINS).[39] The REINS Act, if adopted, would amend the CRA so that a "major rule" would not have legal effect until Congress passes (and the President signs) a joint resolution approving the rule.[40] A major rule is defined as a rule likely to result in:

> [A]n annual effect on the economy of $100,000,000 or more; . . . a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or . . . significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to

33. Only once prior to 2017 did Congress pass and the President sign a joint resolution of disapproval. Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 190 (2009).

34. Michael D. Shear & Karen Yourish, *Trump Says He Has Signed More Bills Than Any President, Ever. He Hasn't.*, N.Y. TIMES (July 17, 2017), https://www.nytimes.com/2017/07/17/us/politics/trump-laws-bills.html.

35. *See* Brito & de Rugy, *supra* note 33, at 189–90 (explaining the expedited review process for any regulation that, if passed, prevents the agency from issuing substantially similar rules).

36. 5 U.S.C. § 801(b)(1).

37. *See id.* § 801(b)(2) (clarifying that a rule that does not take effect under paragraph (1) may not be reissued if it is "substantially the same" as another rule).

38. *See* Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 19 (2013) (noting that the CRA was meant to provide a quick mechanism to invalidate regulatory initiatives, but has not been effective).

39. Regulations from the Executive in Need of Scrutiny Act, H.R. 26, 115th Cong. §§ 1–2 (2017).

40. *Id.* §§ 801(a)(1)(A), (a)(3).

> compete with foreign-based enterprises in domestic and export markets.[41]

Most of the important regulations adopted by agencies would fall within this definition.[42] Consequently, the REINS Act would constitute a major change to the nature of administration: agencies no longer would have the authority to adopt regulations that would have a significant impact on the economy.[43] Instead, agencies would function as advisory bodies that propose rules to Congress for it to adopt or not.[44]

Whether the REINS Act will become law is uncertain. It has passed the House on several occasions, most recently on January 5, 2017.[45] However, in the past, the Senate has not taken up the bill.[46] That may change. On May 17, 2017, the Senate Homeland Security and Governmental Affairs Committee favorably reported S. 21, its version of the REINS Act of 2017, to the floor by a vote of eight to six.[47]

Another regulatory reform bill would attempt to overturn *Chevron* and *Auer* deference. The Regulatory Accountability Act passed by the House in January 2017 contains a title that would overturn *Chevron* and *Auer* deference and require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies."[48] Deference to agency interpretations of

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41. *Id.* § 804(2).

42. *See* Adler, *supra* note 38, at 25 (arguing the REINS Act covers important administrative rules).

43. *See id.* at 22–23, 25 (explaining this provision allows Congress to take responsibility for economically significant policy decisions).

44. *See* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 151–52 (2013) (arguing that agencies would merely propose major rules to Congress).

45. *See H.R. 26 – Regulations from the Executive in Need of Scrutiny Act of 2017*, LIBR. CONGRESS, https://www.congress.gov/bill/115th-congress/house-bill/26 (last updated Mar. 29, 2017) (showing how the House passed an amended REINS Act on Jan. 5, 2017).

46. Elizabeth Kolbert, *Suspending the Rules: How Congress Plans to Undermine Public Safety*, NEW YORKER (Jan. 9, 2017), https://www.newyorker.com/news/daily-comment/suspending-the-rules-how-congress-plans-to-undermine-public-safety.

47. *Senate Homeland Security Committee Approves 17 Bills Including, Boots on the Border, Regulatory Reform and the Fair Chance Act*, HOMELAND SECURITY & GOVERNMENTAL AFF. COMMITTEE (May 17, 2017), https://www.hsgac.senate.gov/media/majority-media/senate-homeland-security-committee-approves-17-bills-including-boots-on-the-border-regulatory-reform-and-the-fair-chance-act (noting that S. 21 received a favorable floor vote of eight to six); Regulations from the Executive in Need of Scrutiny Act, S. 21, 115th Cong. (as reported by S. Homeland Sec. and Gov't Affairs Comm., May 17, 2017).

48. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202 (2017) (labeling Title II § 202 as the Separation of Powers Restoration Act); *see* Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to an agency's interpretation of the agency's own rules); Chevron, U.S.A. Inc. v. Nat. Res.

ambiguous statutory provisions, as well as to the agency's own ambiguous regulations, has a long provenance predating both *Chevron* and *Auer*.[49] While the exact extent of the appropriate deference is sometimes unclear, some judicial deference seems integrally related to the concept of agency administration of statutory provisions.[50] The proposed denial of any judicial deference, in a provision entitled Separation of Powers Restoration Act (SPRA), is thus another attempt to change the nature of administration.

The future of the SPRA is also in question. The Senate amended a parallel bill in committee, the Regulatory Accountability Act (RAA), to eliminate the "de novo" requirement.[51] As opposed to the SPRA, the RAA amends only *Auer* deference by reducing it to *Skidmore*[52] deference. Therefore, the weight that a reviewing court gives an agency's interpretation of that agency's rule would depend on the agency's thoroughness evident in the consideration of the rule; the validity of the reasoning; and the consistency of the interpretation with earlier and later pronouncements.[53]

The true intent of most of the supporters of the REINS Act and the SPRA—both of which fundamentally challenge the legitimacy of agency administration—may be simply to stop regulations. They may not reflect actual philosophic disagreement with agency administration, such as described by Professors Hamburger and Lawson. Nevertheless, the means used in these two proposals, commanding overwhelming majorities in the House and substantial support in the Senate, strike at the very nature of agency administration of laws.

III. THE COURTS

Justice Clarence Thomas seems to have embraced Professor Hamburger's thesis that all agency regulation of private conduct is unconstitutional. "We should return to the original meaning of the Constitution: The Government may create generally applicable rules of

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Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining that courts must defer to agencies when Congress's intent was unclear and the agency's interpretation is reasonable).

49. *See, e.g.*, Nat'l Labor Relations Bd. v. Hearst, 322 U.S. 111, 130 (1944) (stating that deference to an agency's fact-supported conclusions is appropriate); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (deferring to an agency's interpretation of its own regulation unless "plainly erroneous").

50. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 512 (1989).

51. The Regulatory Accountability Act, S. 951, 115th Cong. § 4(b) (2017).

52. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

53. S. 951, 115th Cong. § 4(e).

private conduct only through the proper exercise of legislative power."[54] Similarly, he seems to believe that any deference to an agency's interpretation of either a statute or regulation violates the vesting clause of Article III, for a court does not exercise judicial power when it defers to an agency's interpretation of the law.[55] Then-Judge Neil Gorsuch took a similar position, citing both Professors Hamburger and Lawson, in his concurrence to his own opinion for the majority in *Gutierrez-Brizuela v. Lynch*.[56] Moreover, although his focus was on the unconstitutionality of the *Chevron* doctrine, he also appeared to agree that Congress cannot delegate any lawmaking authority to agencies.[57] While two justices do not a majority make, it is a beginning, or actually it is an increase, inasmuch as Justice Antonin Scalia would not have taken these positions.[58]

The majority of the Supreme Court did speak, however, in *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*.[59] There, the Court addressed the question of whether it was constitutional to allow the removal of members of the PCAOB only for cause if the members of the Securities and Exchange Commission, who would remove the PCAOB members, were themselves only removable for cause.[60] The Court held that it was not.[61] For our purposes, what is important about this decision is that it rested upon the vesting clause of Article II. The Court concluded that insulating the members from Presidential removal in this way was inconsistent with the vesting clause. It said:

> Th[is] arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's

54. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring).

55. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring) (explaining that deference to agency decisions transfers the judiciary's duty of interpretive judgment).

56. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149, 1152, 1154 n.5 (10th Cir. 2016) (Gorsuch, J., concurring) (examining the difficulty of squaring the Constitution with concentrated administrative power).

57. *See id.* at 1153 (arguing the Supreme Court has long held that Congress cannot constitutionally delegate power to the executive).

58. *See* Scalia, *supra* note 50, at 521 ("I tend to think, however, that in the long run *Chevron* will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

59. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513–14 (2010).

60. *Id.* at 514.

61. *Id.*

> conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch."[62]

This is notable because this relatively formalistic approach to a limitation on the President's removal power is inconsistent with the Court's last removal case. In *Morrison v. Olson*, which did not address the vesting clause, the Court used a balancing approach to determine whether the "for cause" limitation on removal was constitutional.[63] As such, the *PCAOB* case breaks new ground, consistent with the rigid application of the vesting clauses espoused by Professors Hamburger and Lawson, and it does so despite the fact that, as the dissent pointed out, such dual-for-cause removal limitations have existed in various laws for some period of time.[64]

At least one commentator has read *PCAOB* even more broadly to undermine the constitutionality of the so-called independent regulatory agencies altogether. In *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, Neomi Rao, the current head of the Office of Information and Regulatory Affairs (OIRA) and on the short list for some for appointment to the D.C. Circuit,[65] wrote that "the structure of the Court's argument, which focuses on the importance of presidential control and accountability through the removal power, logically calls into question the constitutionality of agency independence."[66] In this she joins the much earlier views of Steven Calabresi and Saikrishna Prakash that the vesting clause places the responsibility for execution of the laws in the President to the extent that limitations on the President's removal power and the statutory placement of executive authority in heads

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62. *Id.* at 496–97 (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997)).

63. Morrison v. Olson, 487 U.S. 654, 693 (1988).

64. *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting).

65. *See* Jonathan H. Adler, *D.C. Circuit Judge Janice Rogers Brown to Step Down*, WASH. POST (July 7, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/07/d-c-circuit-judge-janice-rogers-brown-to-step-down/?utm_term=.74a8dff19c16 (noting the eminent retirement of a D.C. Circuit Judge and listing potential replacements).

66. Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2541 (2011).

of agencies is unconstitutional.[67] These views likewise go to the heart of the administrative state, which has heretofore accepted that agencies execute the law subject to oversight by the President, but not subject to his direction.[68]

One case, which at the time of this writing is in *en banc* consideration by the D.C. Circuit, may give the Supreme Court additional opportunities to alter existing understandings as to how agencies may be organized.[69] In *PHH Corp. v. Consumer Financial Protection Bureau*, a D.C. Circuit panel held that restricting the President from removing the Director of the Consumer Financial Protection Bureau, except for cause, was unconstitutional.[70] Because this did not fall under *PCAOB*'s dual-for-cause removal limitation analysis, and faced with precedent that a for-cause removal limitation for a Commissioner of the Federal Trade Commission (FTC) was constitutional,[71] the panel found that, when an agency is headed by a single person, as opposed to a body of members, such as the FTC, that person commanded too much unsupervised power.[72] It said: "In lieu of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and thereby to protect individual liberty."[73] The panel's solution was to declare the for-cause removal limitation void, so that the Director could be removed by the President at will.[74] That decision was vacated with the grant of *en banc* consideration, but until the *en banc* D.C. Circuit rules, and perhaps until the Supreme Court hears the case, the panel's analysis of the unitary executive—again consistent with the

67. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570, 597–98 (1994) (stating the executive vesting clause is a general grant of authority, that includes removal and appointment powers subject to certain limitations).

68. *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 709, 709 n.66 (2007) (explaining that the supervisory role of the Executive removes decision making from the agency).

69. Per Curiam Order Granting Rehearing *En Banc*, PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016) (No. 15-1177).

70. *Id.* at 5, 8.

71. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (holding that the President may not remove any independent regulatory appointee except for reasons that Congress provides).

72. *PHH Corp.*, 839 F.3d at 8.

73. *Id.*

74. *Id.*

analyses of Professors Hamburger and Lawson—casts a shadow on current administrative law understandings.[75]

Constrained by Supreme Court precedent, it is not surprising that judges in lower courts are unlikely to question the legitimacy of the administrative state. It is noteworthy that then-Judge Gorsuch penned his attack on the constitutionality of *Chevron* deference in a concurrence to his own majority opinion that relied on traditional precedent.[76]

IV. THE PRESIDENT

It has been over 35 years since President Reagan promulgated Executive Order (E.O.) 12,291, which put into place the requirement for agencies to send proposed and final rules to the Office of Management and Budget (OMB) for comment before their publication in the Federal Register, as well as the requirement to perform full-blown cost/benefit analyses of rules having a specified effect.[77] While this order was largely viewed at the time as an attempt to diminish agency rulemaking through the imposition of additional time- and resource-consuming procedures, over time the idea of a centralized review system and a systematic consideration of the costs and benefits of regulations grew to receive bipartisan support.[78] As a result, President Clinton, while he revoked E.O. 12,291, issued his own order that virtually mirrored these requirements from the previous Reagan order.[79] With minor changes and additions, those requirements remain in effect today.[80]

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75. Per Curiam Order Granting Rehearing En Banc, *PHH Corp.*, 839 F.3d 1 (No. 15-1177); On January 31, 2018, the court rendered its en banc decision rejecting the panel's opinion on this issue. 881 F.3d 75 (D.C. Cir. 2018).

76. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

77. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,193, 13,196, 13,198 (Feb. 19, 1981).

78. *See* Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), http://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html?pagewanted=all (discussing the fact that some viewed the Executive Order as an obstruction of necessary regulations); *see also* Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 15, 16–17 (2011) (noting that Democrats and Republicans both used the Executive Order to achieve their goals, removing questions of legitimacy).

79. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735, 51,737 (Oct. 4, 1993).

80. The Executive Order was amended by: Exec. Order No. 13,258, 67 Fed. Reg. 9,385, 9,385 (Feb. 28, 2002); Exec. Order No. 13,422, 72 Fed. Reg. 2,763, 2,763 (Jan. 18, 2007); Exec. Order No. 13,497, 74 Fed. Reg. 6,113, 6,113 (Feb. 4, 2009) (revoking authority of Exec. Order 13,258). It was supplemented by: Exec. Order No. 12,875, 58 Fed. Reg. 58,093, 58,094 (Oct. 28, 1993); Exec. Order No. 13,083, 63 Fed. Reg. 27,651, 27,653 (May 19, 1998); Exec. Order No. 13,084, 63 Fed. Reg. 27,655, 27,656 (May 19, 1998); Exec. Order No. 13,095, 63 Fed. Reg. 42,565, 42,565 (Aug. 7, 1998) (suspending authority of Exec. Order No. 13,083); Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,259

President Trump, however, issued an executive order with a different thrust. Rather than require additional procedures designed, at least in theory, to improve regulations, he adopted a different approach. In E.O. 13,771, he imposed two novel requirements on additional rulemaking.[81] First, the order requires that, in the year 2017, for each new regulation an agency adopts, it must identify two regulations that it will repeal, and the cost imposed by the new regulation must at least be offset by the reduction in costs imposed by the repealed regulations.[82] In subsequent years, every agency must identify in its Regulatory Plan each regulation that increases incremental cost and the two offsetting regulations for repeal that reduce costs, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.[83] Second, the order provides that the Director of the OMB shall establish a regulatory budget for each agency—the total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year.[84] And the Order prohibits agencies from exceeding that regulatory budget, unless required by law or approved by the Director of the OMB.[85] In speaking in terms of the Director "approving" agency regulations, the order takes steps beyond what has existed heretofore under E.O. 12,866 (and its predecessor E.O. 12,291), which referred only to the Director reviewing, advising, overseeing, and commenting on an agency's proposed and final rules.[86]

With its two-for-one requirement and its measurement solely of costs of regulations, ignoring the benefits of the same regulations, E.O. 13,771 departs from any pretense of improving the regulatory process.[87] Instead, it focuses entirely on reducing regulatory costs, which, by ignoring regulatory benefits, results in the reduction of regulation for the sake of the reduction of regulation.[88] This too reflects the attack on the regulatory state.

(Aug. 10, 1999); Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 9, 2000); Exec. Order No. 13,211, 66 Fed. Reg. 28,355, 28,355 (May 22, 2001); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (Jan. 21, 2011); Exec. Order No. 13,609, 77 Fed. Reg. 26,413, 26,414 (May 4, 2012).

81. Exec. Order No. 13,771, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).

82. *Id.*

83. *Id.* at 9,339–40.

84. *Id.* at 9,340.

85. *Id.*

86. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993) (referring to the OMB's supervisory role in the regulatory process).

87. *See generally* Exec. Order No. 13,771, 82 Fed. Reg. at 9,339–40 (focusing on the burdens of regulations).

88. *See id.* (focusing repeatedly on the cost of regulations and neglecting to mention the term "benefit" in the language of the Order).

V. CONCLUSION

The above discussion outlines the attack on the administrative state that is being pursued by some in the academy, Congress, the courts, and the Presidency. It is clear that this attack does not command majority support in the first three of these venues at the present time.[89] The administrative state is well established and finds support from various constituencies, even from constituencies that complain about particular regulations.[90] Nevertheless, it is safe to say that this attack has gained momentum in recent years, and inasmuch as "originalism" as a method of interpretation of the Constitution was once an outlier and now is the dominant form of interpretation, one cannot simply dismiss this new attack.[91] Moreover, it is noteworthy that the attack on the administrative state comes from members of The Federalist Society—the same organization whose members propagated "originalism" in constitutional interpretation and from which Republican Presidents seek new judges and justices.[92] This movement seeks a paradigm shift in the concept of federal governance, and in this day of failed predictions, one should take this movement seriously.

89. *See supra* Part I (noting that only two prominent academics reject the administrative state); *supra* Part II (noting that steps by Congress to restrict administrative agencies have been met with little support); *supra* Part III (noting that the judiciary has been hesitant to restrict administrative agencies, evidenced by numerous Supreme Court decisions).

90. *See supra* Part III (discussing jurists' acceptance of the administrative state as a whole, in light of their qualms with particular regulations).

91. *See, e.g.*, David F. Forte, *The Originalist Perspective*, HERITAGE GUIDE TO CONST., https://www.heritage.org/constitution/#!/introessays/3/the-originalist-perspective (last visited Apr. 15, 2018) (identifying originalism as the dominant form of constitutional interpretation).

92. *See About Us*, FEDERALIST SOC'Y, http://www.fed-soc.org/about-us (last visited Apr. 15, 2018) (describing the Federalist Society's commitment to its originalist ideology).