

# Republican Remedies for the Administrative State

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THE MODERN ADMINISTRATIVE STATE reflects a fundamental failure of republican self-governance. Over the course of decades, the federal government’s three constitutional branches ceded ever more power to administrative agencies. Their legacy is a nation governed disproportionately, even predominantly, by the agencies. To remedy this will require a concerted recommitment to republican governance by all three branches: by Congress, by the President, and by the Judiciary. And, most of all, by the people themselves.

To that end, the essays in this book propose reforms by the Congress, the president, and the judiciary—sometimes independently, sometimes in conjunction with one another. In our time, as in James Madison’s, reform requires a “republican remedy.”<sup>1</sup>

## A CRISIS OF GOVERNANCE

The roots of these essays lie in a conference convened a year ago by Matthew Spalding, at Hillsdale College’s Kirby Center, blocks away from the U.S. Capitol. Spalding generously welcomed a variety of scholars, policymakers, and private practitioners to debate and analyze the modern administrative state from a variety of perspectives.

The forum itself challenged participants to raise their sights, for in the Kirby Center’s lecture hall hangs an inspiring portrait: *The Signing of the American Constitution*, by Sam Knecht.<sup>2</sup> But Spalding took care to emphasize the breadth and depth of the problem at hand.

We often think of the “administrative state” as a political-science abstraction—a theoretical problem to be solved through better legal theory. “In reality,” he explained, “our nation suffers from a long

developing crisis of governance, with causes that run deep and baleful ramifications that reach just as far. The modern administrative state is a new form of regime, a substitute for actual republican self-governance.”

“The administrative state” is often meant to refer narrowly to the federal government’s so-called “fourth branch,” the federal agencies. But rightly understood, “the administrative state” encompasses something far more comprehensive: namely, our current state of federal governance, which is dominated by agencies’ regulatory actions, undertaken purportedly pursuant to open-ended statutes. The agencies accomplish this largely—though not completely—at the direction of the president and his White House, with too little or too ineffectual oversight by Congress, and with disconcertingly deferential judicial review by federal courts.

In so doing, the federal agencies deform republican government and not just at the national level, but at the state level, too. They accomplish this in at least two ways. First, federal agencies’ regulations “preempt” broad swaths of policymaking that would otherwise be undertaken by the states themselves, to such a degree that federal administrative law has become “the home of a new federalism,” displacing Congress and the Supreme Court as the traditional calibrator of federalism.<sup>3</sup> Second, nominally “cooperative” federalism programs, such as the Clean Air Act administered by the EPA, too often replace “cooperation” with co-option or effective commandeering, forcing states’ hands.

Simply put, today the nation’s most significant policy choices and value judgments are made by regulators, not by Congress. To be clear, this trend toward administrative supremacy did not begin in 2009; it can be traced back a century or more. But in the Obama administration we saw its apotheosis.

President Obama arrived in office with Democratic majorities in both houses of Congress. And he had campaigned for office with a rhetoric of legislative collaboration, criticizing the Bush administration’s own use of executive power. “The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all,” he had told a Pennsylvania audience in early 2008. “And that’s what I intend to reverse when I become president of the United States of America.”<sup>4</sup> He went even further, in elaborating such themes in his second book, where he wrote that governance requires compromise produced by what he called “genuine” bipartisanship. “Genuine

bipartisanship,” he stressed, “assumes an honest process of give-and-take” in service of a common goal, and “[t]his in turn assumes that the majority will be constrained...to negotiate in good faith.” He contrasted this with negotiations in which the majority party “begin[s] every negotiation by asking for 100 percent of what it wants, go[es] on to concede 10 percent, and then accuse[s] any member of the minority party who fails to support this ‘compromise’ of being ‘obstructionist.’”<sup>5</sup>

As a legislator, then-Senator Obama no doubt spoke and wrote those words in good faith. But President Obama governed much differently. On many significant issues, such as energy and environmental policy, his administration and his co-partisans in Congress engaged in only perfunctory legislative negotiations before moving energetically to purely regulatory solutions, attempting to implement programs that Congress—even a Congress controlled by his own party—did not authorize.<sup>6</sup> On the highly contentious question of reforming our immigration laws, he eschewed the legislative process and instead simply declared a policy of widespread non-enforcement, memorialized in memoranda issued by the Justice Department and Department of Homeland Security; “I just took an action to change the law,” he said.<sup>7</sup>

On other occasions, nominally “independent” agencies executed the administration’s stated policies on matters ranging from labor law to nuclear energy, while the administration purported to disclaim responsibility for the National Labor Relations Board’s battles with Boeing, or the Nuclear Regulatory Commission’s efforts to shut down the decades-old Yucca Mountain nuclear-waste repository program.<sup>8</sup> Later in his administration, as the Federal Communications Commission was formulating its “Open Internet Order,” achieving the administration’s longstanding goal of imposing so-called “net neutrality” regulations on broadband Internet service providers, President Obama disclaimed credit for having prevailed upon the FCC to adopt his plan, saying in public that “[t]he FCC is an independent agency, and ultimately this decision is theirs alone.”<sup>9</sup>

Even his two signature legislative achievements—the Affordable Care Act and the Dodd-Frank financial reforms—largely avoided defining the substance of new laws governing health care and finance, and instead focused on creating new regulatory frameworks that would allow new regulatory agencies to set policy, often with unprecedented statutory insulation against Congress and future presidents.

In pressing his administrative agencies to carry out his policies, President Obama persistently argued that legislative friction justified avoiding the legislature altogether. “I want to work with Congress to create jobs and opportunity for more Americans,” he said in a characteristic 2014 radio address. “But where Congress won’t act, I will.”<sup>10</sup>

Or, as he famously explained at 2014’s first Cabinet meeting:

I’ve got a pen and I’ve got a phone—and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward in helping to make sure our kids are getting the best education possible and making sure that our businesses are getting the kind of support and help they need to grow and advance to make sure that people are getting the skills that they need to get those jobs that our businesses are creating.

And I’ve got a phone that allows me to convene Americans from every walk of life—non-profits, businesses, the private sector, universities—to try to bring more and more Americans together around what I think is a unifying theme: making sure that this is a country where if you work hard, you can make it.<sup>11</sup>

But the gulf between Senator Obama’s paeans to democratic compromise and President Obama’s pen-and-phone unilateralism does not prove that he never truly believed his own pre-presidential words. Indeed, to assume that Senator Obama was being untruthful only distracts us from the more important and discomfiting point.

That is, when we take all his statements as genuine, we are confronted with the modern administrative state’s corrosive effect: Even a president who arrives in office committed in good faith to the institutions of republican government and a spirit of “genuine bipartisanship” can be seduced by the administrative state’s promise of efficient, uncompromising power.

Again, President Obama was hardly the first president to eschew the friction of republican governance for the ease of administrative supremacy. But his experience, following that of his predecessors, illustrates the administrative state’s destructive gravitational pull on our politics. Presidents frustrated by the friction of democracy turn ever more easily to administrative governance. His co-partisans in Congress, connected more firmly to their party than their place in the House and

Senate,<sup>12</sup> support him in eschewing legislation.<sup>13</sup> And his opponents in Congress, recognizing that the president lacks incentives to fully engage the legislative process, see all the less reason to approach the debate with compromise in mind.

Seeing the feedback loop that continuously reinforces the administrative state, it calls to mind another of Madison's insights. Our administrative state has come to resemble Madison's vision of legislatures at their very worst: The modern administrative state "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>14</sup> The solution, in our time as in Madison's, is a commitment to republican government—the separation of powers, and checks and balances.

#### THE ADMINISTRATIVE STATE: PAST AND PRESENT

The history of America's administrative state has been written time and time again, most recently by Christopher DeMuth and before that by many others.<sup>15</sup> The Constitution was written to remedy the many failings of America's first national government, and among them was the absence of an executive branch capable of administering Congress's laws—what James Q. Wilson called "the Founders' depressing experience with chaotic and inefficient management under the Continental Congress and the Articles of Confederation."<sup>16</sup>

Over the course subsequent decades, however, Congress delegated ever more responsibility to the executive branch and then to administrative agencies. First, it was merely the responsibility to decide factual questions having policy implications;<sup>17</sup> then, the power to "fill up the details" of a statutory scheme.<sup>18</sup> The 20<sup>th</sup> century witnessed ever-broader delegations of power by Congress to agencies, first resisted by the Supreme Court and then finally accepted by it.<sup>19</sup> The trend only accelerated in the 20<sup>th</sup> century's latter half and into the 21<sup>st</sup>, with agencies such as the Environmental Protection Agency and the Consumer Financial Protection Bureau.<sup>20</sup> At the same time, agencies were structured with increasingly innovative forms of independence, while (as described in "Reforming Administrative Law to Reflect Administrative Reality," p. 51) their legal interpretations received increasing deference from courts.<sup>21</sup>

And agencies have grown ever more aggressive and innovative in imposing policy without going through public rulemakings or agency adjudications, two types of agency policymaking that qualify as "final

agency action” and thus are susceptible to judicial review. Instead, agencies rely increasingly on “guidance” documents which purport to be “non-binding,” but which (as the agencies know) nevertheless spur the regulated parties to change their conduct out of fear of agency punishment. Similarly, agencies vested with effectively open-ended power by Congress can often impose their policies not through action but rather through *inaction*, by simply refusing to enforce laws already on the books, such as federal immigration laws. In both of these respects, and others, the administrative state is increasingly a passive-aggressive administrative state, enforcing its will even while protesting otherwise.

Today, it is difficult to meaningfully describe the size of our administrative state, let alone quantify it, without resorting to figures that beggar description. One might count the number of “significant rules”—*i.e.*, rules costing the public \$100 million annually—sent by agencies to the White House for cost-benefit review, or the total number of final rules published in the *Federal Register*, regardless of size. (In 2015, agencies produced 415 significant rules and 3,410 final rules.<sup>22</sup>) Or you could simply count the number of pages in the *Federal Register* setting forth final rules. (In 2015, 24,694 pages.)

The George Washington University Regulatory Studies Center collects myriad statistics along these lines.<sup>23</sup> Other organizations, too, have attempted more sophisticated estimates. For example, the Heritage Foundation’s annual “Red Tape Rising” report concluded that the Obama administration’s rulemaking activity in 2015 “increased annual regulatory costs by more than \$22 billion, bringing the total annual costs of Obama administration rules to an astonishing \$100 billion-plus in just seven years.”<sup>24</sup> The Competitive Enterprise Institute’s annual “Ten Thousand Commandments” report concluded that “regulatory compliance and economic impacts” of federal regulation amounts to “\$1.885 trillion annually.”<sup>25</sup> And the American Action Forum’s “600 Major Regulations” report concluded that the Obama administration has imposed 600 major regulations with a total public cost of at least \$743 billion.<sup>26</sup>

And to the extent that such studies rely on data or estimates produced by the agencies themselves, one must be wary the regulators’ habit of underestimating the costs of their rules, or exaggerating the benefits—as former OIRA Administrator Susan Dudley and others have observed.<sup>27</sup> And the “independent” agencies, which are not subject to the overarching

cost-benefit requirements that the White House imposes upon “executive” agencies, are even less rigorous in their analyses.<sup>28</sup>

The Mercatus Center at George Mason University is now attempting even more sophisticated and nuanced quantifications of the economic impacts of federal regulation, applying its RegData analytical model to economic data, and concludes that regulatory growth cost our economy \$4 trillion between 1980 and 2012.<sup>29</sup>

Whatever one’s preferred metric, no one can plausibly dispute the diagnosis of our modern administrative state offered by Chief Justice John Roberts in a 2013 opinion: “The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today’s vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities. The administrative state with its reams of regulations would leave them rubbing their eyes.”<sup>30</sup>

#### RESTORING REPUBLICAN SELF-GOVERNANCE

In his seminal 1938 lectures on “The Administrative Process,” New Dealer James Landis celebrated the burgeoning administrative state as a triumph of modern governance over antiquated American constitutionalism, “spring[ing] from the inadequacy of a simple tripartite form of government to deal with modern problems.”<sup>31</sup>

Dean Landis’s triumphalism and optimism were misplaced. While the modern administrative state might sometimes “deal with” problems of public policy in a narrow sense, it has raised a host of other problems — problems of public policy, but also, more profoundly, problems of our capacity to govern ourselves. As Niall Ferguson writes in *The Great Degeneration* (2012), “excessively complex regulation is the disease of which it pretends to be the cure.”

But in attempting to truly cure the disease, we must not mistake the symptoms for the underlying sickness. The administrative state is itself a symptom our failure of self-governance. Our three branches for federal government were responsible for it, by freely allowing — sometimes affirmatively encouraging — the shift from republican governance to administrative supremacy.

To adapt John Hart Ely’s diagnosis of the similar shift in war powers, “[i]t is common to style this shift a usurpation, but that oversimplifies to the point of misstatement.” While proponents of administrative

power, including more than a few Presidents, “generally wanted it that way,” the fact remains that “Congress (and the courts) ceded the ground without a fight. In fact, and this is much of the message of this book, the legislative surrender was a self-interested one: Accountability is pretty frightening stuff.”<sup>32</sup>

Fault for our modern administrative state lies not with the administrators who aggrandized power to themselves, but rather with the other three branches, and with the people themselves.

By the same token, responsibility for solving these problems lies ultimately with the people, acting through all three branches of government. The following chapters attempt to chart a path to reform.



# Notes

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## REPUBLICAN REMEDIES FOR THE ADMINISTRATIVE STATE

1. “No. 10” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 79.
2. The portrait is depicted and discussed on the Kirby Center’s website. See: <https://kirbycenter.hillsdale.edu/painting>.
3. Gillian E. Metzger, “Administrative Law as the New Federalism,” *Duke Law Journal* 57 (2008): 2023, 2027.
4. Jonathan Karl, “Obama’s Long Lost Campaign Promise,” ABC News (Feb. 17, 2014), <http://abcnews.go.com/blogs/politics/2014/02/obamas-long-lost-campaign-promise>.
5. Barack Obama, *The Audacity of Hope* (New York: Three Rivers Press, 2006), 131.
6. See, for example, Adam J. White, “Obama’s Cynical Energy Agenda,” *National Affairs* (Summer 2012): 16-34.
7. See, for example, Adam J. White, “Unfaithful Executive,” *City Journal* (Winter 2015).
8. See, for example, Adam J. White, “Reining in the Agencies,” *National Affairs* (Spring 2012): 42-58.
9. The White House, “Statement by the President on Net Neutrality,” press release, November 10, 2014.
10. The White House, “Weekly Address: Working When Congress Won’t Act,” press release, May 17, 2014.
11. The White House, “Remarks by the President Before Cabinet Meeting,” press release, January 14, 2014.
12. Cf. “No. 51” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 319. (“The interest of the man must be connected with the constitutional rights of the place.”)
13. See, for example, Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, Not Powers,” *Harvard Law Review* 119 (2006): 1.
14. “No. 48” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 306.

15. See, for example, Christopher DeMuth, “Can the Administrative State Be Tamed?,” *Journal of Legal Analysis* 8 (2016): 121; Adam J. White, “The Administrative State and the Imperial Presidency: Then and Now,” in *The Imperial Presidency and the Constitution*, ed. Gary J. Schmitt et al. (forthcoming, 2017); Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008); Leonard D. White, *The Federalists: A Study in Administrative History* (New York: Macmillan, 1948); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982); Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford: Oxford University Press, 2014); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (New York: Cambridge University Press, 2012); Richard P. Nathan, *The Administrative Presidency* (Hoboken: John Wiley & Sons, 1983); Gary Lawson, “The Rise and Rise of the Administrative State,” *Harvard Law Review* 107 (1994): 1231.
16. James Q. Wilson, “The Rise of the Bureaucratic State,” *The Public Interest* 41 (Fall 1975).
17. See, for example, Act of July 31, 1789 (authorizing customs officials to, receive reports, keep records, receive vessels and goods, and, “to estimate the duties payable thereon”); *The Brig Aurora*, 11 U.S. 382 (1813).
18. *Wayman v. Southard*, 23 U.S. 1 (1825).
19. See, for example, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *NBC Inc. v. United States*, 319 U.S. 190 (1943).
20. See, for example, Christopher DeMuth, “Can the Administrative State Be Tamed?” *Journal of Legal Analysis* 8 (2016): 121, 124–27.
21. Adam J. White, “The Administrative State and the Imperial Presidency: Then and Now,” in *The Imperial Presidency and the Constitution*, ed. Gary J. Schmitt et al. (forthcoming, 2017).
22. Maeva P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, Congressional Research Service, October 4, 2016.
23. Regulatory Studies Center, “Reg Stats,” George Washington University Columbian College of Arts and Sciences, <https://regulatorystudies.columbian.gwu.edu/reg-stats>.
24. James L. Gattuso and Diane Katz, *Red Tape Rising 2016: Obama Regs Top \$100 Billion Annually*, The Heritage Foundation, May 23, 2016, <http://www.heritage.org/>

## *Policy Reforms for an Accountable Administrative State*

- research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually.
25. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Regulatory State*, Competitive Enterprise Institute, 2016.
  26. Sam Batkins, “600 Major Regulations,” *American Action Forum*, August 6, 2016, <https://www.americanactionforum.org/insight/600-major-regulations/>.
  27. Susan E. Dudley, “Perpetuating Puffery: An Analysis of the Composition of OMB’s Reported Benefits of Regulation,” *Business Economics* 47 (2012): 165; Sam Batkins, “To Presume Much,” *Regulation* (Spring 2016).
  28. Adam J. White, “Reviewing Independent Agency Rulemaking,” Testimony Before the Senate Committee on Homeland Security and Government Affairs, Subcommittee on Regulatory Affairs and Federal Management (September 8, 2016); Office of the Inspector General, CFTC, *An Investigation Regarding Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (April 15, 2011); Arthur Fraas and Randall Lutter, *On the Economic Analysis of Regulations at Independent Regulatory Commissions*, RFF Discussion Paper 11-16 (April 2011).
  29. Bentley Coffey, Patrick McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations,” Mercatus working paper, April 26, 2016.
  30. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quotation marks, citations, and brackets omitted).
  31. James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938), 1.
  32. John Hart Ely, *War and Responsibility* (Pennsylvania: Diane Publishing, 1993), ix.

### REASSERTING CONGRESS IN REGULATORY POLICY

33. “No. 48” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 306.
34. The president also effectively “legislates” through executive orders.
35. Kevin R. Kosar, “Three Steps for Reasserting Congress in Regulatory Policy,” R Street Institute policy study no. 34, March 2015.
36. “No. 70” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, (New York: Signet Classics, 2003), 422.
37. Alexander Hamilton, Pacificus No. 1, June 29, 1793, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett et al., 26 vols. (New York and London: Columbia University Press, 1961-79) (emphasis added).
38. In the Senate today, moving legislation usually requires the assent of 60 of the 100 senators.