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# Introduction: Administrative Lawmaking in the Twenty-First Century

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## SYMPOSIUM

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### INTRODUCTION: ADMINISTRATIVE LAWMAKING IN THE TWENTY-FIRST CENTURY

*Jeffrey A. Pojanowski\**

It is always hard to map a river while sailing midstream, but the current state of administrative law is particularly resistant to neat tracing. Until the past few years, administrative law and scholarship was marked by pragmatic compromise: judicial deference on questions of law<sup>1</sup> (but not too much and not all the time)<sup>2</sup> and freedom for agencies on questions of politics and policy<sup>3</sup> (but not to an unseemly degree).<sup>4</sup> There was disagreement around the edges—and some voices in the wilderness calling for radical change—but they operated within a shared framework of admittedly unstated, and perhaps conflicting, assumptions about the administrative state and the rule of law.

Today, there is a sense that this pragmatic consensus is becoming unstable. Critics of the administrative state and its constitutional legitimacy seek a return to an original settlement of limited, separated powers.<sup>5</sup> At the other end of the spectrum, scholars who applaud lawyers' retreat from interfering with administrative governance call for a more complete abnegation.<sup>6</sup> In between these poles lies uncertainty or fresh attempts to bolster a center that threatens no longer to hold. With so much in administrative law and theory up for grabs, the *Notre Dame Law Review's* Symposium "Administrative Lawmaking in the Twenty-First Century" could not be timelier.

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1 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2 See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

3 See *Heckler v. Chaney*, 470 U.S. 821 (1985).

4 See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

5 See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

6 See ADRIAN VERMEULE, *LAW'S ABNEGATION* (2016).

Judicial deference to agency legal interpretations has long been a focus of administrative law and scholarship, but discussion of this topic has intensified in recent years. Critics in the judiciary and the academy alike have questioned the validity of longstanding deference doctrines,<sup>7</sup> while others have rallied to their defense.<sup>8</sup> In this Symposium, Mila Sohoni addresses the question of whether courts should withhold deference from “major questions” of statutory interpretation.<sup>9</sup> This doctrine had a supporting role in the blockbuster Affordable Care Act decision *King v. Burwell*, raising questions about whether the decision portended future narrowing of *Chevron* deference.<sup>10</sup> Professor Sohoni contends that the best reading of *King* limits the decision to its particular context, namely where the interpretation of an unclear statute authorizes substantial, widespread spending by the federal government. Sohoni cautions that lower courts should not read *King* as undermining *Chevron* deference more broadly.

Turning from deference theory to judicial practice, Kent Barnett and Chris Walker continue their groundbreaking empirical work on federal courts of appeals’ application of *Chevron* doctrine.<sup>11</sup> In these pages, Professors Barnett and Walker explore federal appellate courts’ approach to “Step Two” of *Chevron* doctrine, which inquires whether an agency’s interpretation of an unclear statute is reasonable.<sup>12</sup> Their study demonstrates that agencies win an astounding percentage of cases once they get to Step Two. Furthermore, Barnett and Walker have discovered that courts of appeals’ approaches to Step Two are more likely to resemble purposivist statutory interpretation or the application of arbitrary-and-capricious review, as opposed to a strongly textualist inquiry.

Moving beyond *Chevron*’s domain, the Symposium’s contributions focus on the constitutional structure of the administrative state. Kristin Hickman’s article examines three recent separation-of-powers cases in which reviewing courts invalidate legislative schemes that insulate agency actors from presidential control, but offer a remedy that merely tweaks the statutory arrangement to render it lawful.<sup>13</sup> These decisions, Professor Hickman contends,

7 See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016) (criticizing *Chevron* deference).

8 See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017) (defending deference to agency interpretation of regulations).

9 Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419 (2018).

10 See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

11 See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (introducing their study).

12 Kent Barnett & Christopher J. Walker, *Chevron Step Two’s Domain*, 93 NOTRE DAME L. REV. 1441 (2018).

13 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and reh’g en banc granted* 881 F.3d 75 (D.C. Cir. 2018); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

are consonant with American legal and political culture's commitments to formal separation of powers and judicial independence, yet the cases' narrow remedies do little to promote those values. She is not sure, however, that any better options are in the offing.<sup>14</sup>

Drilling down on a particular problem along these lines, Aditya Bamzai explores an important, emerging question on who counts as an "officer" under the Constitution's Appointments Clause.<sup>15</sup> Recently, scholars have been grappling with the implications of the practice in the early republic of appointing government officials with the title of "deputy." To shed light on this question, Professor Bamzai analyzes the opinions of five early Attorneys General and concludes that their understanding of whether a deputy was an "officer" for Appointments Clause purposes tracks the traditional, functional understanding of officer status.

Perhaps the most hotly contested separation-of-powers questions in recent years revolve around the proper scope of executive discretion to enforce the laws and implement policy. Three contributions to the Symposium focus on that important topic. Aaron Nielson offers the results of his empirical study about agency decisions about whether or not to enforce the law.<sup>16</sup> Drawing on survey data and interviews with officers from nine agencies, Professor Nielson explains the heterogeneity of agency policy and procedure in this area, offers a taxonomy to make sense of the variegated results, and offers suggestions to improve agency practice and safeguard against arbitrariness.

Urska Velikonja continues the theme of empirical investigation with her contribution on the shifting enforcement policies at the Securities and Exchange Commission.<sup>17</sup> Professor Velikonja identifies a pullback in enforcement efforts in recent years, which she finds worrisome, particularly because the Commission has not publicly explained or justified its shift in enforcement policy. Velikonja offers suggestions that could ameliorate the problem, or at least improve our understanding of its scope.

Adam White's work shifts focus from agency behavior to the President's use of discretion. He identifies the increased practice of presidential use of executive orders to direct agencies to adopt particular policies.<sup>18</sup> The D.C. Circuit has concluded that when agencies implement these orders, they are relieved from the obligation to respond to public comments in rulemaking proceedings.<sup>19</sup> A consideration of more general administrative law princi-

14 Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475 (2018).

15 Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501 (2018).

16 Aaron L. Nielson, *How Agencies Choose to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018).

17 Urska Velikonja, *Patterns of Nonenforcement*, 93 NOTRE DAME L. REV. 1549 (2018).

18 Adam J. White, *Are Executive Orders a "Trump Card" in the Rulemaking Process?*, 93 NOTRE DAME L. REV. 1569 (2018).

19 See *Sherley v. Sebelius*, 689 F.3d 776, 784–85 (D.C. Cir. 2012).

ples and doctrines, White concludes, supports the D.C. Circuit's decision. Should this doctrine remain good law, we will likely see an increase in rulemaking by executive order.

Finally, two contributions defend the administrative state against its new critics. Jack Beermann argues that, in fact, these critics do not represent anything entirely new, for the administrative state is always and ever under siege by its detractors.<sup>20</sup> Professor Beermann insists, moreover, that this most recent assault ought to fail. It would shift power from the political branches to the federal courts and would undermine the government's ability to address challenges we face as a modern society—results that he sees are not required by our constitutional order.

Jon Michaels then defends the professionals who operate within the administrative state under siege. In particular, he parries the attack that a "Deep State" of unelected mandarins is somehow undermining American democracy by frustrating the Trump administration's initiatives.<sup>21</sup> Unlike the shadowy puppet masters in Russia, Turkey, or Egypt—whose image the phrase "Deep State" is intended to conjure—the depths of the American bureaucracy are staffed with diverse and accountable people who lack the means or the desire to grab the reins of power. Professor Michaels concludes that the federal bureaucracy needs such depth—and more of it—if administrative lawmaking in the twenty-first century is to produce sound policy in line with to our country's constitutional commitments.

The Symposium's contributions reflect a diverse array of jurisprudential and methodological perspectives. They are alike, however, in their rigor, clarity, and intellectual charity, features that will be necessary for considering the challenges and possibilities of administrative lawmaking in the twenty-first century.

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20 Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

21 Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).