Administrative Law Scholarship in Our Present Political Moment

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- Gillian Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 **Harv. L. Rev.** 1 (2017).
- Aaron L. Nielson, *Response, Confessions of an "Anti-Administrativist,"* 131 **Harv. L. Rev. F.** 1 (2017).
- Mila Sohoni, Response, *A Bureaucracy—If You Can Keep It*, 131 **Harv. L. Rev. F.** 13 (2017).

In the Fifth Edition of the *Administrative Law Treatise*, released in 2010, Richard Pierce described a raging debate within the academic community and the courts at that time over the appropriate role of democratic values and institutions in the administrative state. This debate encompassed such topics as the validity of unitary executive theory, how best to resolve disagreements between Congress and the President, and how to manage the risk that courts would become "the primary architects of national policy through their efforts to keep agencies within legal boundaries." Eight years later, that same debate over the values, institutions, and structures of contemporary governance still rages on. A trio of pieces published last fall by *Harvard Law Review* both exemplifies and contributes to that ongoing conversation. As the author of this academic year's *Harvard Law Review Foreword*, Gillian Metzger has penned a bold and provocative defense of the modern administrative state. Aaron Nielson and Mila Sohoni provided thoughtful response essays. Collectively, these pieces demonstrate scholarly engagement at its best.

As one might expect of the *Foreword*, Metzger's article is masterful in its articulation and support of two separate but related propositions. The first is her identification of a combined political, jurisprudential, and scholarly trend that she labels "anti-administrativism" and characterizes as the contemporary resurrection of a very old fight. As she opens her piece, "Eighty years on, we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal." Metzger characterizes as anti-administrativist various actions and initiatives of the Trump Administration and the Republican Congress to reduce regulatory burdens, downsize the federal government, and reform the Administrative Procedure Act. Other presidents have pursued a similar agenda, but Metzger says their "promises … largely went unfulfilled" as compared to present efforts. Metzger also classifies as anti-administrativist a number of Supreme Court and D.C. Circuit cases—some from the 2016 Term, others predating it—concerning separation of powers principles, the *Chevron* and *Auer* standards of judicial review, and other constitutional issues.

Finally, Metzger turns to the academic literature, contending that the "growing judicial resistance to administrative government is supported by increasing academic attacks on the constitutional legitimacy of administrative government." Exhibit A is Philip Hamburger's controversial and hotly debated book, *Is Administrative Law Unlawful?*. But she also calls out Randy Barnett, David Bernstein, and Richard Epstein for their libertarian critiques of federal regulation as unconstitutional and a threat to individual rights. And, in a footnote, she cites Nielson and Sohoni along with other scholars as "pushing back at administrative governance more incrementally … through administrative law." From all of this, Metzger synthesizes three "core themes" of anti-administrativism: "strident rhetoric" (aka "bureaucracy bashing"); a greater role for the Article III courts as a counterweight against excessive exercises of executive power; and a "constitutional flavor," "marked by originalism," emphasizing—in stark contrast to the modern administrative state—separation of powers as the critical and constitutionally-designated tool for constraining the federal government and protecting individual liberty. Metzger's article then goes on to draw at length "striking parallels" between anti-administrativism and 1930s resistance to the New Deal.

Metzger responds to the anti-administrativist trend she identifies with her second main proposition: that the Constitution not only accommodates but requires the modern administrative state. To a fair extent, Metzger's conclusion is dictated by her assumptions. Most critically, Metzger assumes that modern conditions require an expansive federal government

and that accomplishing everything the federal government takes on requires Congress to delegate large amounts of discretionary power to the executive branch. Metzger also assumes a method of constitutional interpretation, particularly with respect to separation of powers principles, that is not especially constrained by the Constitution's text. In her view, the Framers may have wanted limited government and checks and balances to protect against the abuse of governmental power, but they also wanted government to be effective. Thus, constitutional.

In sum, the goal of constitutional separation of powers principles is "an accountable, constrained, *and effective* executive branch." And, Metzger argues, if expansive federal government and broad delegations of discretionary power to the executive branch are givens, then bureaucracy rather than presidential administration is the best way to accomplish that constitutional goal. Concentrating too much power in presidential hands is potentially dangerous. By contrast, diffusing governmental power across multiple agencies, separating functions within agencies themselves by segregating prosecutors and adjudicators, and relying on managerial oversight and supervision within agencies are better constraints on the exercise of governmental power while facilitating governmental accountability and effectiveness. Thus, contemporary bureaucracy is constitutionally required as the best means of effectuating the goals of separation of powers.

Whether or not they did so intentionally, Nielson and Sohoni seem to have divided responsibility for responding to Metzger's *Foreword*, with Nielson principally addressing Metzger's first proposition and Sohoni addressing her second. Nielson questions the assignment of people into two distinct camps of "anti-administrativists" and "those who are committed to the administrative project." Virtually no one, he asserts, "thinks all administrative action is bunk" or "the administrative state can do no wrong." If being critical of the administrative state qualifies one as anti-administrativist, then Nielson suggests that the label extends to "a majority of members of Congress, at least four justices of the Supreme Court …, a bipartisan collection of former Presidents, legal academics holding a wide variety of views, and a Nobel Prize winner," as well as prominent New Dealers such as Justices Douglas and Jackson and "the liberal lion himself," Justice Brennan—all of whom questioned or criticized one or some aspects of the administrative state. Taking Metzger's three core themes of anti-administrativism as a three-part test for anti-administrativist status yields similarly mixed results. Nielson does not make this suggestion, but perhaps Metzger's dichotomy is better recast as a continuum, with most people falling somewhere in the middle but some closer to the ends based on a combination of their views. But, of course, a continuum is not quite so easily reconciled with a trend.

Regardless, to Nielson, the critical point is that "history did not end in 1946." The external pressures that agencies face continually evolve and change, and the internal cultures and operations of agencies themselves also have evolved and changed, so administrative law statutes and doctrines must evolve and change, too. "And because not everything has worked out as rosily as the optimists in the 1940s hoped, today's anti-administrativists are not chasing boogeymen." Reasonable people inevitably will debate and disagree about the direction and scope of administrative law changes as they are contemplated and occur. If such debate and disagreement are to be fruitful, then we should neither confuse nor dismiss criticism of the administrative state as the wholesale rejection of it. Rather, we need to recognize rather than resist the need for legal evolution and change, search for common ground, and pursue compromise as we all strive to make government effective.

Sohoni, meanwhile, takes on Metzger's argument that the modern administrative state is constitutionally required rather than merely constitutionally permissible. Sohoni is more sympathetic toward Metzger's characterization of some subset of politicians, judges, and scholars as anti-administrativist. She also agrees with many of Metzger's observations that contemporary rhetoric is sometimes excessive and that history can be a useful tool for thinking about present debates. The main focus of Sohoni's essay, however, concerns the doctrinal consequences of Metzger's constitutional argument.

Sohoni questions Metzger's assumption that congressional delegation of power to the executive branch is required for contemporary governance. As Sohoni observes, this foundational premise for Metzger's constitutional argument is "precisely the kind of idea that many anti-administrativists most fiercely contest." Going along with Metzger's argument, however, Sohoni asks, "If we take it as a given that delegation is constitutional and a necessary feature of

government, what are the kinds of arrangements that are also constitutionally necessary to ensure that the executive branch has the necessary tools to carry out its duty to govern accountably and effectively?" The simplest answer, Sohoni says, is to read the Constitution "as implicitly giving the executive branch something like its own 'necessary and proper' power" and to constitutionalize many or even most executive branch practices as essential to effectuate delegated power. But doing that, Sohoni contends, would more or less deprive Congress of its authority to specify through legislation "how administrative government ought to operate." If we try to avoid that outcome and instead draw narrower constitutional lines around the executive branch's power and scope, we run into exactly the sorts of questions and arguments that Metzger decries as anti-administrativist.

Metzger's *Foreword* is an impressive work of scholarship, but the scholarly enterprise is best observed by reading it in conjunction with Nielson's and Sohoni's thoughtful responses. Administrative law scholarship is often intertwined with political events of the day. Government acts, and administrative law scholars react. Our current political moment, however, includes so much harsh rhetoric, and along with that rhetoric, an almost eager willingness to cast those with whom we disagree politically as an evil "other." Metzger, Nielson, and Sohoni do not mince words or shy away from objecting to or criticizing each other's arguments and ideas. But they disagree without becoming disagreeable. They prod one another, but productively. They engage rather than talking past one another. In this spirit, may the raging debate over the values, institutions, and structures of contemporary governance continue.

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