

# The Hedgehog & the Fox in Administrative Law

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*This essay examines the constitutional muddle of the administrative state with reference to how agencies operate – it looks at a hedgehog’s problem from the fox’s perspective. Not only does the structure and delegated authority of administrative agencies often exist in substantial tension with the Constitution, but agencies regularly fail to act in a manner that promotes “constitutional values.” Drawing from my experience as regulatory czar, I explain that regulatory policy is frequently developed with little regard for separation of powers, political accountability, due process, or other values drawn from the Constitution. Proponents of the status quo thus cannot rely on such values to legitimize the ever-expanding activity of administrative agencies.*

“The fox knows many things, but the hedgehog knows one big thing.”<sup>1</sup>

I saiah Berlin’s famous dichotomy between the hedgehog and the fox posits a distinction between those who focus on big ideas and universal truths and those who focus on granular realities. In reading the essays in this volume, it struck me that the dichotomy sheds light on the fundamental debate in administrative law: namely, whether the administrative state is constitutional.

Favoring the hedgehog’s approach, I have previously raised arguments against the constitutionality of the modern administrative state.<sup>2</sup> Such arguments have gained substantial ground in recent years. Scholars have advanced textual, structural, and historical explanations for how the administrative state exists in substantial tension with the Constitution, including the expansive delegations of legislative authority to the executive branch, the existence of independent agencies,<sup>3</sup> and the combination of lawmaking, execution, and judicial functions in agencies.

In response to the constitutional critiques, some modern defenders of the administrative status quo have claimed that it is consistent with “constitutional values.” They have sought to shift the debate away from the Constitution and toward the mechanisms and structures of the administrative state they believe can replicate constitutional values and functions.<sup>4</sup> Unlike the arguments of the early Progressives, these claims depend not only on the necessity or desirability of expert

administration, but also on the insistence that the administrative state reflects and embodies constitutional values. These arguments ultimately depend on fox-like claims about how administration works in practice.

My experience as administrator of the Office of Information and Regulatory Affairs (OIRA)<sup>5</sup> provided a unique perspective from which to assess these constitutional debates – the regulatory czar must be both hedgehog and fox. To start with, there is a big idea within OIRA’s mission: namely, that the president should control regulatory policy across the dozens of agencies that make up the executive branch. Such presidential direction promotes unitary execution of the laws, consistent with the president’s power and responsibilities under Article II of the Constitution. Presidential control provides essential democratic accountability for the many discretionary decisions that make up regulatory policy. A unitary executive is designed to pursue energetically the goals for which the people elected the president. That is the hedgehog side of things. But the executive branch must also do the difficult business of executing the laws; of administering the thousands of statutes, regulations, and programs run by the federal government. This work goes on, often quite apart from whatever big ideas one might have about the administrative state. In the most practical way, OIRA operationalizes the unitary executive. Overseeing the development of regulations and regulatory policy across the executive branch, I had the opportunity to see up close how agencies work and to appreciate the foxy side of administration.

This essay draws from that experience to explain some of the infirmities of the constitutional values defense of the administrative state. From my supervision of rulemaking, guidance documents, and other regulatory policy across dozens of agencies, I explain how OIRA provides an important form of constitutional accountability. But I have also observed that many persistent features of administration work against democratic accountability, separation of powers, and due process. I discuss just a few of these problems here.

First, regulatory action often advances with little political direction or supervision, undermining claims of internal checks and balances and the development of real expertise. Second, widespread waivers and exemptions benefit those with access to agency decision-makers, similarly threatening rule of law values and distorting agency rulemaking. Finally, through regulations, guidance, and grant requirements, administrative agencies have made a relatively new foray into cultural and social areas, trampling decisions previously left to individuals, families, and local communities. Agencies often accomplish by administrative fiat actions that one can hardly imagine surviving the democratic give and take of the political process.

From my hedgehog’s perspective, the Constitution is our supreme law, the one big thing that gives our government its authority and limits. Constitutional values are only a shadow of the real thing. But even on functionalist terms, the constitutional values described by proponents of the administrative state turn out to be

more fancy than fact. The administrative state suffers constitutional infirmities not only from the hedgehog's perspective, but also the fox's.

**T**he most fundamental debate in administrative law has always concerned whether and how the administrative state can be reconciled with the Constitution.

As Justice Robert H. Jackson noted in 1952, federal agencies “have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.”<sup>6</sup> The combination of powers within administrative agencies flies in the face of the separation of powers and threatens individual liberty, democratic accountability, and the fundamental protections of due process. Scholars and jurists who look at the original meaning of the Constitution find the administrative state incompatible with the Constitution's careful vesting of distinct powers in branches with distinct features.<sup>7</sup> Perhaps most fundamental, the vesting of all legislative power in Congress means that such power cannot be delegated to the executive or the courts.<sup>8</sup> But overly broad delegations of legislative power to administrative agencies allow for the exercise of a kind of lawmaking power by the executive branch, rather than by Congress. This flies in the face of the nondelegation principle, which provides perhaps the central protection for the republican form of government under a limited Constitution.<sup>9</sup> Moreover, the sheer size and reach of the executive branch makes it difficult for the president to retain control of administration. The creation of so-called independent agencies places substantial delegated authority outside the direct control of the president, in contravention of the creation of a unitary executive and the vesting of all executive power in the president.<sup>10</sup> Finally, the courts must exercise the judicial power to say what the law is, but the complexity of regulatory decisions and the lack of a judicially enforced nondelegation principle often results in courts deferring to administrative agencies.<sup>11</sup>

It may come as a surprise that in their critiques of the administrative state, present-day originalists read the Constitution in essentially the same way as the early Progressives. Those Progressives forthrightly acknowledged that the creation of an expansive administrative state, operating under broad delegations and combining the powers of lawmaking, enforcement, and adjudication, would be fundamentally incompatible with the Constitution.<sup>12</sup> The Progressives celebrated this fact: rather than follow outmoded concerns for individual liberty and private property, the new agencies would focus on expertise and government control for the social good. Early proponents of the administrative state understood that the government they hoped to establish would stand in stark conflict with the text, structure, and purposes of the Constitution.<sup>13</sup>

Modern proponents of the administrative state break with both originalists and the early Progressives. Against the background of the expansive modern ad-

ministrative state, some defenders of the administrative state now emphasize constitutional values, largely accepting existing judicial interpretations allowing open-ended delegations and the independence of agencies from political control. Bracketing arguments about the fundamental unconstitutionality of the administrative state, they would shift the focus away from the Constitution and to constitutional values.<sup>14</sup> They propose that the administrative state is arranged and structured to reflect constitutional standards and the functional equivalent of separation of powers.<sup>15</sup>

This attempt to ground the existing administrative state in constitutional values has gained in popularity among constitutional and administrative law scholars. Gillian Metzger, one of the primary proponents of this view, has argued that “the administrative state is essential for actualizing constitutional separation of powers today, serving both to constrain executive power and to mitigate the dangers of presidential unilateralism while also enabling effective governance.”<sup>16</sup> She explains that the “bureaucracy, expert and professional personnel, and internal institutional complexity” of the administrative state make “an accountable, constrained, and effective executive branch.”<sup>17</sup> These features “carry constitutional significance, both in satisfying constitutional structural requirements and in ensuring that broader separation of powers principles retain force in the world of contemporary governance.”<sup>18</sup>

Similarly, Emily Bremer has suggested that administrative law can further the separation of powers through 1) the relationships among the three branches in controlling the administrative state; 2) the relationship between the administrative state and each of the other branches; and 3) in the separation of functions within each agency.<sup>19</sup> Metzger and Kevin Stack have also emphasized the legitimacy promoted by “internal administrative law,” which they identify as the internal processes, guidelines, policies, management structures, and other procedures that serve as effective constraints on agency power.<sup>20</sup> They see internal administrative law as playing a “critical role in ensuring the legitimacy and accountability of the administrative state.”<sup>21</sup> These are just some of the variants of a general project of defending the functional constitutionality of the administrative state.<sup>22</sup>

Critics of the administrative state point primarily to law: the text, structure, and history of the Constitution. Certain arrangements are lawful or unlawful. By contrast, the broad claim that administration fits within a reconstructed range of constitutional values depends in large measure on how administration actually works. Does the expert bureaucracy provide accountability? Do the structural arrangements of administrative agencies provide checks and balances in a manner that mirrors the Constitution’s separation of powers?

The modern defenders of administration are foxes, relying not on the Constitution, but on assertions about how particular agency arrangements can reflect and promote constitutional values. This view rests on an explicit empirical claim:

the administrative state is “not just beneficial in a good government sense” but also “satisf[ies] constitutional structural requirements and . . . ensur[es] that broader separation of powers principles retain force in the world of contemporary governance.”<sup>23</sup> For instance, Metzger asserts that the administrative state “yields important constitutional benefits” and that it “performs essential constitutional functions in supervising, constraining, and effectuating executive power.”<sup>24</sup> Metzger and Stack postulate that at the “conceptual level,” “internal structures” imposed by insulating agencies from presidential control can “implement basic commitments to legality and political accountability.”<sup>25</sup> These arguments invoke the Constitution, and so have a formalist patina, but they are in fact functionalist claims that turn on how administrative law works in the real world. The constitutional values defense relies on a series of factual assertions that administrative agencies as presently structured can provide the type of accountability and constraint consistent with constitutional values.

Critically, proponents of the administrative status quo do not claim it is consistent with the Constitution, but rather maintain that administrative agencies nonetheless serve values reflected in the Constitution. I should note that I am not here addressing the difficult question of what “values” are reflected in the Constitution. The Constitution is not a hortatory document: there is no “accountability” clause or “legitimacy” clause or “separation of powers” clause. The Constitution reflects essential principles for our constitutional republic; however, it implements those principles through the creation of branches with particular features and the careful vesting of government powers in those branches. The administrative state reassigns and blends those powers in countless ways, which naturally raises the question of how constitutional values can be served outside of the Constitution’s requirements. That question lies outside the scope of this essay and in the discussion that follows I simply take the constitutional values asserted by proponents on their own terms.

**F**rom my experience as administrator of OIRA, overseeing the regulatory activity of agencies across the executive branch, I have found little evidence to support the claims that constitutional values are furthered in administrative structure or practice. In fact, many features of modern administration systematically subvert political accountability, separation of powers, expertise, and due process.

The new defenders of the administrative state make arguments that sound in constitutional theory, but they turn inexorably on facts about “constitutional benefits” and “constitutional functions.” From this perspective, constitutional law is not treated as a binding and knowable constraint, and so the validity of the constitutional values defense depends on whether administrative agencies in fact possess the claimed properties.<sup>26</sup> The theory depends on empirical realities, but proponents are long on abstractions and short on details. Supporting the claim

that the administrative state reflects constitutional values requires more than conceptual generalizations.

While I can hardly claim a comprehensive study of the operation of administration in these pages, I share some fox-like observations about the regulatory process and whether and how it reflects constitutional values, as broadly defined by proponents of this view. I start by explaining how OIRA provides one of the most effective mechanisms for promoting constitutional values in administration by ensuring presidential and White House control over regulatory policy. It cannot cure all the pathologies of administration, but OIRA review can make regulatory policy *more constitutional*. I also highlight some examples of the nitty-gritty workings of regulatory practice, explaining some persistent, and sometimes overlooked, features of administration that run headlong into values of democratic accountability, separation of powers, and expertise.

**G**iven the ever-expanding reach of regulatory policy, centralized review of significant regulations at OIRA provides an essential form of accountability, rationality, and coordination. For over forty years, the office has promoted fundamental principles of presidential control over administration and thereby democratic accountability for regulatory decisions. OIRA also advances other important principles of good government, such as public participation, coordination, and due process. In a variety of ways, the process of centralized regulatory review serves many of the constitutional values identified by defenders of the administrative state.

Because OIRA is often known as the most important office no one has ever heard of, I will briefly explain how it works.<sup>27</sup> OIRA originated with the Paperwork Reduction Act, which President Carter signed into law in 1980. President Reagan then set forth more detailed parameters for OIRA's regulatory review process in Executive Order (E.O.) 12291.<sup>28</sup> Essentially, OIRA coordinates and directs regulatory policy by reviewing economically and politically significant regulations from across the executive branch. The review process includes career experts at OIRA carefully reviewing the proposed regulation: its justifications, legal authority, and cost-benefit analysis. Just as important, the review process shares the proposed regulation with other affected agencies and White House offices, including the Counsel's Office, Domestic Policy Council, National Economic Council, and myriad other presidential advisors as appropriate. This centralized process allows political and career officials from across the executive branch and within the White House to weigh in on significant regulations from their different perspectives. Conflicts and differences of opinion are generally resolved by OIRA and, if necessary, with a meeting of agency heads and ultimately the president.

The fundamental principles guiding OIRA review have long been expressed in President Clinton's E.O. 12866, which built on President Reagan's original exec-

utive order. With unusual and thoroughgoing bipartisan support, E.O. 12866 has become foundational to the regulatory process. The Executive Order starts with a “regulatory philosophy” and articulates twelve regulatory principles.<sup>29</sup> These ideas have guided regulatory review across both Democratic and Republican administrations. They are nonpartisan principles for regulation and apply both to deregulatory and regulatory actions. E.O. 12866 is truly a constitutive document in that it does not speak to how much regulatory activity or what type of regulation an administration will pursue; instead, it sets forth a philosophy and basic principles of rationality, expertise, and public welfare. It creates mechanisms to implement these principles and promote these values.

Scholars who have very different perspectives on administrative law have advocated leaving E.O. 12866 in place, and for good reason.<sup>30</sup> Rooting White House review in this foundational document gives it a continuity and weight irrespective of the regulatory direction of an administration. Presidents invariably have their unique guiding principles for regulatory policy, but they have maintained E.O. 12866 and its fundamental principles of regulatory review.<sup>31</sup> President Trump, for example, set out to eliminate burdensome and ineffective regulations, with a focus on freeing individuals, families, and companies from unnecessary government control. It was in large measure a kind of populist deregulatory agenda, focused on promoting economic, social, and religious liberty. The goal was to make administration more constitutional and, at the same time, more effective. He maintained E.O. 12866 but issued a series of additional executive orders, including the creation of a regulatory budget and the requirement of eliminating two regulations for each new one.<sup>32</sup>

Soon after taking office, President Biden repealed some of Trump’s executive orders, but also “reaffirm[ed] the basic principles” of E.O. 12866 and called for “modernizing regulatory review” based on the values of “social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.”<sup>33</sup> As an institution, OIRA avoids conflicts about the substance of regulatory policy, instead focusing on good regulatory practices that can improve decision-making, reduce arbitrariness, and ultimately promote better outcomes for the American people. Presidents with very different regulatory approaches have remained committed to OIRA and its regulatory review function.

OIRA’s process of centralized regulatory review promotes a number of constitutional principles. First and foremost, it operationalizes the unitary executive. The Constitution vests all executive power in the president, which means that the president must be able to control and direct execution of the laws.<sup>34</sup> Such control involves superintending administration: the president serves not only as the commander in chief, but as the administrator in chief.<sup>35</sup> Although disagreement continues over the extent of such control, the very idea of “presidential administration” has widespread purchase.<sup>36</sup> In a vast administrative state, the president can-

not possibly track even major regulatory initiatives. OIRA ensures that important policies are reviewed by senior White House officials who are closest to the president and his policy agenda.<sup>37</sup> This provides essential democratic accountability because regulations will follow the election, particularly with respect to discretionary policy choices.

Second, OIRA review provides internal checks on regulatory policy. It creates a mechanism for different White House offices and agencies to review regulatory policies, providing a wider base of participation, expertise, and judgment. A regulatory problem will be vetted from a variety of different perspectives, thus checking and balancing the particular and narrow interests of a single agency and improving the legitimacy of the ultimate regulatory decision.<sup>38</sup>

Third, OIRA reduces the arbitrariness of regulatory decisions. At the outset, OIRA makes agencies answer the question of why a particular regulatory action is necessary and how it fits into the existing regulatory landscape: what is the problem to be solved and, if regulation is not required by a statute, is it a problem susceptible to a regulatory solution? Agencies must also demonstrate that their policy produces net benefits for the American people: namely, that the benefits of the regulation outweigh the costs. While debates will always exist about which costs and benefits should count, it is difficult to justify a regulation that imposes greater costs than benefits on society.<sup>39</sup> Because OIRA passes a proposed regulation through other agencies and White House offices, the process can be used to avoid duplication or to resolve conflicts, such as when agencies adopt different standards to deal with the same problem.

The primary limitation on OIRA review is its reach. Notably exempt from the OIRA review process are the regulatory actions of the historically independent agencies, despite the long-standing understanding that such review would be constitutional.<sup>40</sup> In addition, OIRA review extends to economically and politically significant regulatory actions, which includes only a subset of all regulatory activity; however, OIRA determines which regulations are significant, and so could review more regulations with additional resources.

OIRA review provides a powerful mechanism for implementing political control over the bureaucracy. In practice, OIRA and the process of regulatory review it oversees is one of the most effective institutional mechanisms to ensure constitutional administration.

**T**he administrative state extends well beyond the White House and the centralized regulatory review process at OIRA. Drawing from my experience overseeing the regulatory process, I explain a few specific ways in which the development and substance of regulatory policy undermines the constitutional values of separation of powers, democratic accountability, legitimacy, and nonarbitrariness.<sup>41</sup>



*Initiation myopia: regulatory policy without political supervision.* While an ongoing debate continues about whether and with what specificity Congress may delegate authority to agencies, expansive and numerous delegations have a consequence that is overlooked: namely, that regulations are often initiated at a very low level of government. The conventional view assumes that regulatory policy originates with an agency head or senior official, or at times with a White House directive, and that therefore the president asserts political control, at least indirectly, over delegated authority. Yet a sea of regulatory activity occurs outside of such accountability structures. Regulations, guidance documents, and policy statements sometimes find their origination and completion with a single government employee, despite the fact that Congress in most instances delegates authority to the heads of agencies.<sup>42</sup> Regulatory actions can be radically decentralized, not only away from presidential control, but without control or supervision by any accountable political official.

Faced with a significant volume of regulatory responsibility, agency heads sometimes subdelegate their statutory authority, with varying degrees of residual oversight.<sup>43</sup> Agency staff can thus seize the opportunity to identify a problem and write up an advanced notice of proposed rulemaking, then a notice of proposed rulemaking, and ultimately a final rule. Depending on the agency and its organization, and the importance of the regulation, such activity might be reviewed by senior officials; but once the regulatory ball is rolling it is very difficult to change direction, much less stop it altogether.

The problem expands when we take into account subregulatory activity, such as guidance documents and policy statements. As OIRA administrator, I asked agencies to review their guidance documents, which involved identifying them, eliminating outdated or conflicting guidance, and making the documents publicly accessible.<sup>44</sup> In many instances, this proved to be an overwhelming task. We found instances of extant guidance documents that existed nowhere but the drawer of a single employee. Agencies such as Health and Human Services frankly acknowledged that it would be impossible to identify and catalog all guidance documents. While the government binds the public with regulations and then interprets those regulations through guidance documents, some agencies could not even *identify*, much less make public and available on a website, all of their guidance documents. And although guidance documents are not formally binding, the reality is that guidance may have coercive power, not dissimilar from a statute or regulation. Agencies have significant enforcement powers, as well as control over billions of dollars of grant money, and so regulated entities frequently attempt to take shelter in guidance.<sup>45</sup>

With significant opportunities for regulatory action, a single bureaucrat can at times exercise an authority that exceeds that of a member of Congress. Consider that hundreds of bills are proposed each year by individual representatives and senators, or small groups of lawmakers. Most of these, irrespective of their

merits, get not so much as a committee hearing, much less a vote. The agency employee, however, may not only initiate but complete a regulation that affects the rights and obligations of private parties, or pen a guidance document that influences how those rights and obligations are understood and enforced.

Some agencies have a greater degree of centralized review of regulations and, of course, economically and politically significant actions go through OIRA's centralized regulatory review process, which helps "to rein in bureaucratic freelancing."<sup>46</sup> Such review, however, reaches only a small fraction of regulatory activity.<sup>47</sup> Meaningful burdens can be imposed by regulations that do not reach the threshold for OIRA review or even consideration by an agency head or other political official.

The practical reality of how regulatory discretion and power are exercised undercuts the claim that administration reflects constitutional accountability. The Constitution creates a particular type of accountability that depends on direction and supervision by politically accountable actors. In agencies, however, many decisions are made without such direction and supervision. Initiation of policy by lone, politically unaccountable employees fractures the unitary structure of execution of the laws: a single official might not know what is happening elsewhere in the agency (much less in other agencies) and is less likely to be aware of conflicting regulations or policies. It is unrealistic to assume that a person trained in a narrow area, and without involvement in her agency's broader strategic decision-making, would be able to see the big picture and whether a regulation is necessary or effective. In the absence of political oversight and direction, agency staff may, through inadvertence or design, undermine the policies of the president, the democratically elected head of the executive branch.

Moreover, fractured decision-making has only a tenuous claim to "expertise." True regulatory expertise requires not just the specialized or granular knowledge that a few officials may possess, but also a broader understanding of the existing regulatory landscape, legal requirements, and economic and social needs.<sup>48</sup> Every regulatory choice involves a series of trade-offs between various public interests, policy goals, and costs. One could hardly expect such expertise to exist in a few government officials who are unaware of the wider regulatory picture. Decisions that seem rational in isolation may in fact be unnecessary, duplicative, or arbitrary when considered in light of additional information.

Regulatory myopia is magnified when decision-making is pushed to lower levels of government. Progressives sometimes point to professional norms of the bureaucracy as providing important constraints in addition to expertise, and I was fortunate at OIRA to work with an exceptionally talented and professional career staff. Nonetheless, the incorporation of professional norms varies across agencies and also from individual to individual and so cannot adequately or consistently stand in for expertise and accountability.

Regulatory authority is often exercised in dispersed silos, a fact that challenges the claims that internal or functional separation of powers operates to check and balance administration. Administrative structures fail consistently to ensure the necessary political accountability is brought to bear on the wide range of regulatory decisions made by career staff.

*The pernicious and pervasive problem of regulatory carve-outs.* In order to avoid regulatory burdens, individuals, companies, and members of Congress acting on their behalf frequently seek exemptions. The process of creating and granting regulatory exemptions undermines the accountability, legitimacy, and expertise claims for administration.

As administrative activity expands, so too does the use of exemptions.<sup>49</sup> Exemptions, like regulations, are often secured through rent-seeking and tend to benefit those with the greatest ability to sway agency officials. Getting out from under onerous and expensive regulations can mean big business and is thus pursued by special interest groups as well as members of Congress representing industries within their districts and states. Regulatory exemptions and waivers are an insider's game, often turning on access and influence and providing little visibility and accountability. Targeted exemptions thus tend to benefit the well-heeled and connected. The disparate availability of exemptions runs against our egalitarian and democratic values, which affirm that no man (or company or congressman) should be above the law.

Exemptions can also distort incentives, resulting in less beneficial regulation and, in some cases, unnecessary and overly burdensome regulation.<sup>50</sup> While some might cheer poking holes in an otherwise onerous regulatory regime, exemptions provide short-term benefits to a few well-connected groups, which in turn only make it more likely that onerous regulations will be placed on other parties. If the primary opponents to a regulation secure an exemption before the regulation is enacted, they may in fact support the imposition of regulatory burdens on their competitors and barriers to entry for future competitors. The granting of exemptions eliminates the constituency most likely to fight against or to moderate a regulation, which in turn may result in less socially beneficial regulatory policy. Moreover, regulators often have little to lose by granting exemptions: they can be a relatively low-cost way of buying off vocal opposition and allowing the agency to move forward with an otherwise controversial policy.

Exemptions and nonenforcement practices vary across agencies and come in different shapes and sizes, more than I can canvass in this essay.<sup>51</sup> Some exemptions may be socially beneficial, such as those that tailor regulations to generate the greatest benefits at the lowest costs by, for example, exempting small entities.<sup>52</sup> Other exemptions may seek to protect important constitutional liberties, such as freedom of religious exercise.<sup>53</sup> Nonetheless, exemption practices often reflect some of the worst problems with administration. For instance, the avail-

ability of exemptions and who benefits from them is often entirely hidden from the public and therefore from political accountability. Moreover, because exemptions frequently turn on the political influence of a favored member of Congress, company, or individual, the granting of exemptions is often unconnected with expertise or good regulatory outcomes.

Agencies often have statutory authority for waivers.<sup>54</sup> Although the explicit grant from Congress may increase the legal legitimacy of exemptions, it does not necessarily improve regulatory outcomes. As Mila Sohoni has explained, waivers and delay can undermine the “administrative constitution.” She identifies problems in a number of areas, including immigration policy and the Deferred Action for Childhood Arrivals waiver program, health care and Affordable Care Act waivers, and education and the No Child Left Behind waiver program.<sup>55</sup> Another example is the Dodd-Frank Wall Street Reform and Consumer Protection Act, which creates substantial discretion within several financial regulatory agencies, expanding waiver authority.<sup>56</sup> Richard Epstein has argued that agency discretion “can end up blurring the line between coercive power and waiver power in a way that grants these agencies an immense amount of informal authority – authority that extends well beyond the powers they are granted by Congress.” He identifies the Food and Drug Administration’s process for new drug approval as a prime example.<sup>57</sup> Others have focused on renewable fuel standard credits, which involve ongoing, intense rent-seeking, and are the subject of litigation in the courts of appeals and the Supreme Court.<sup>58</sup>

Moreover, waivers are distinct from the executive branch’s traditional non-enforcement power. When the government declines to enforce the law, the law remains the same and could be enforced if circumstances change. On the other hand, waivers purport to change the law, granting a specific exemption or reprieve from certain legal requirements. This distinction may particularly matter in regulatory areas, such as environmental law, where Congress has authorized citizen suit enforcement. Agencies sometimes argue against judicial review of waivers, maintaining that those who are subject to regulatory requirements lack standing to challenge a waiver given to a different person.<sup>59</sup>

The process of regulatory exemptions highlights another institutional and constitutional difficulty. The executive power includes a discretionary authority not to prosecute or not to enforce administrative requirements. Congress has set general laws through the legislative process and the executive branch can exercise a discretionary nonenforcement power, consistent with a system of checks and balances. In the regulatory space, however, the agencies both write the “law” through regulation and then determine who is exempt from it. Administrative rulemaking thus blends general lawmaking power with the execution of those laws.<sup>60</sup> The collapsing of these functions further undercuts the claims that agencies effectively embody constitutional values and internal separation of powers.

*Social values and administration.* While the discussion of initiation myopia and exemptions focuses on procedural or structural problems with administration, the substance of regulatory policy increasingly raises constitutional concerns. Agency regulation on hot-button moral, ethical, and social issues challenges the democratic legitimacy of administration. One of the most important constitutional principles is that separation of powers serves individual liberty and protects against government intrusions on individual rights. The Article I, Section 7 requirements of bicameralism and presentment make it difficult for Congress to act on issues about which Americans are divided, and action on such matters is usually possible only with compromise and a minimalist approach. The administrative state unravels many of these fundamental protections.

There is a substantial and important literature on the economic impacts of regulation and how it infringes individual liberty by tangling individuals and businesses in red tape. There is scant discussion, however, on how the administrative state – regulations as well as welfare transfers with conditions – distorts not just the marketplace, but also family life, community, and religious practice. Regulatory approaches to hot-button cultural issues demonstrate that agencies lack the restraints incorporated into constitutional checks and balances. We live in a pluralist society in which Americans have diverse, and sometimes incommensurate, religious, cultural, and social values. Divisions among Americans make a uniform federal approach difficult to enact, and so it is hardly surprising that Congress virtually never legislates on matters such as abortion, contraception, or affirmative action.

Instead, Congress has delegated substantial authority to agencies, authority that agencies increasingly use to impose federal mandates that implicate matters of life and death, religious practice, marriage, and the family. For example, the Equal Employment Opportunity Commission sought to regulate church hiring decisions, a regulatory action found unconstitutional by the Supreme Court.<sup>61</sup> Whereas the far-reaching Affordable Care Act was silent on contraception, Health and Human Services imposed a regulation mandating the provision of contraception by employers.<sup>62</sup> Agencies also use regulatory action and federal funding to condition whether domestic and foreign entities provide abortion, an issue that whipsaws from administration to administration. It is difficult to imagine Congress passing any of these regulations through the ordinary legislative process.

The involvement of agencies on such matters is a relatively new development. For most of U.S. history, the federal administrative state had nothing whatsoever to say about religious and moral questions. The expansion of federal programs, grants, and transfer programs has provided agencies with numerous levers to impose social policy in a way that takes sides in the culture wars. The Constitution largely left these issues to local and state governments, but federal agencies increasingly issue sweeping regulations that leave little room for disagreement and accommodation of different viewpoints and beliefs.

Many Americans consider such intrusions deeply illegitimate and unconstitutional, and oblivious to differences in religious and community norms. In particular, Americans with sincerely held religious beliefs increasingly find their views under siege by administrative agencies. The reality is that the federal bureaucracy largely (though of course not exclusively) reflects a particular class of workers that is not representative of Americans as a whole. For example, although recent elections reflect a country fairly divided between Democrats and Republicans, political donations from agency workers skew overwhelmingly to Democrats.<sup>63</sup> Unlike the legislative process, which brings together representatives from around the country who reflect their communities' diverse beliefs and mores, agency workers tend to represent a narrower political class centered in Washington, D.C.

Problems of legitimacy and accountability do not run exclusively in one direction. Presidents pursuing conservative regulatory policy will no doubt frustrate progressive Americans. Administrations are directed, quite appropriately, by the president, and on controversial issues, administrations will follow the president's policies, though not always with the moderating influence of legislation. The difficulty of enacting legislation means that presidents will seek to capitalize on their control over administrative agencies. On disputed matters, about which agencies often have substantial discretion, internal checks and balances may fail to provide legitimacy and accountability for those on the losing side of regulatory policy.

Congress rarely legislates on cultural issues because members cannot reach consensus or compromise on what are often contentious questions. In part, this reflects our Constitution at work: when a common federal approach cannot be reached, individuals are left free to follow their beliefs and work within their communities to resolve problems through state and local political processes. By contrast, the ever-expanding administrative state is not content to leave such matters to individuals, families, and their local communities. Sweeping regulatory approaches to cultural issues demonstrate how the administrative state fails to promote the legitimacy, accountability, and protection for individual liberty at the heart of our Constitution.

Administration often falls short of constitutional values because it often falls short of the Constitution. Restoring Congress as the central lawmaking body in our federal government would go a long way to making administration more constitutional. Delegations to the executive branch have upended our system of government, distorting not just the lawmaking power but also the executive and judicial powers. Holding that hedgehog's idea, however, will not cure the pathologies of administration, at least not right away. The relationship between big ideas and more ordinary facts is complex, in administrative law no less than in political philosophy. Absent a substantial realignment of the administrative state, important work remains for the fox. As I learned at OIRA,

faithful execution of the laws means ensuring agencies stay within their delegated authority, follow processes that encourage political accountability, and promote due process in the creation and enforcement of regulatory policy. The exercise of the judicial power reflects a different institutional balance between hedgehog and fox, but that is a topic for another day.

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#### AUTHOR'S NOTE

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The Honorable **Neomi Rao** is a Circuit Judge on the U.S. Court of Appeals for the District of Columbia Circuit. She served as the Administrator of the Office of Information and Regulatory Affairs from 2017 to 2019.

#### ENDNOTES

- <sup>1</sup> Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (London: Weidenfeld & Nicolson, 1953) (quoting a fragment from the Greek poet Archilochus).
- <sup>2</sup> See, for example, Neomi Rao, "Why Congress Matters: The Collective Congress in the Structural Constitution," *Florida Law Review* 70 (1) (2018): 1; and Neomi Rao, "Removal: Necessary and Sufficient for Presidential Control," *Alabama Law Review* 65 (5) (2014): 1205.
- <sup>3</sup> So-called independent agencies are historically understood to be independent of presidential control, because the heads of such agencies cannot be removed at will by the president.
- <sup>4</sup> Several essays in this volume similarly discuss practical facts of how administration works. Some identify further problems with an account of administration serving constitutional values. See Mark Tushnet, "Introduction: The Pasts & Futures of the Administrative State," *Dædalus* 150 (3) (Summer 2021).
- <sup>5</sup> An office within the Office of Management and Budget, OIRA leads a centralized process of White House review of significant regulatory actions. As explained more below, that process includes careful economic and legal analysis and coordination of regulatory policy across the executive branch.
- <sup>6</sup> See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Robert H. Jackson dissenting).

- <sup>7</sup> See, for example, Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). See also John Marini, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century* (New York: Encounter Books, 2019); Dean Reuter and John Yoo, eds., *Liberty's Nemesis: The Unchecked Expansion of the State* (New York: Encounter Books, 2016); and Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (6) (1994): 1231.
- <sup>8</sup> U.S. Constitution, Article I, Section 1.
- <sup>9</sup> See Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," *New York University Law Review* 90 (5) (2015): 1463, 1494–1496; Gary Lawson, "Delegation and Original Meaning," *Virginia Law Review* 88 (2) (2002): 327, 335–337; *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 74 (2015) (Clarence Thomas, concurring in the judgment, noting that the Constitution and "the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct").
- <sup>10</sup> U.S. Constitution, Article II, Section 1. See also Rao, "Removal."
- <sup>11</sup> See U.S. Constitution, Article III, Section 1.
- <sup>12</sup> For example, Frank Goodnow argues that the U.S. Constitution focuses on individual rights drawn from natural rights theory and the political philosophy of the eighteenth century, but that conditions have changed and "we no longer believe as we once believed that a good social organization can be secured merely through stressing our rights. The emphasis is being laid more and more on social duties. The efficiency of the social group is taking on in our eyes a greater importance than it once had." Frank Goodnow, "The American Conception of Liberty," in *American Progressivism: A Reader*, ed. Ronald J. Pestritto and William J. Atto (Lanham, Md.: Lexington Books, 2008). See also Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (2) (1887): 197, 209–210 (noting that administration is "removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study"); and Roscoe Pound, "Justice According to Law," *The Mid-West Quarterly* 1 (3) (1914): 223 (explaining that while Americans previously took it as "an axiom that the people themselves were subject to certain fundamental limitations, running back of all constitutions and inherent in the very nature of free government," now "a great change has gone forward . . . the present generation seems eager to reject the idea of a fundamental law . . . [and] is eager to unshackle administration, to take away judicial review of administrative action").
- <sup>13</sup> See, for example, James M. Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938), 12 (the government "vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization"). See also Lawson, "The Rise and Rise of the Administrative State," 1231 ("The original New Dealers were aware, at least to some degree, that their vision of the national government's proper role and structure could not be squared with the written Constitution").
- <sup>14</sup> To be sure, other scholars have provided originalist defenses of delegations that form the basis for the modern administrative state. See, for example, Julian Davis Mortenson and Nicholas Bagley, "Delegation at the Founding," *Columbia Law Review* 121 (2) (2021): 277, 282 (surveying historical practice and concluding that "the nondelegation doctrine



- has nothing to do with the Constitution as it was originally understood”); and Nicholas R. Parrillo, “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s,” *Yale Law Journal* 130 (6) (2021): 1288, 1313 (exploring the direct tax of 1798 as “important evidence that the American political nation in the Founding era viewed administrative rulemaking as constitutional, even in the realm of domestic private rights”).
- <sup>15</sup> Jeremy Kessler and Charles Sabel term this a “progressive synthesis.” See Jeremy Kessler and Charles Sabel, “The Uncertain Future of Administrative Law,” *Dædalus* 150 (3) (Summer 2021).
- <sup>16</sup> Gillian E. Metzger, “1930s Redux: The Administrative State Under Siege,” *Harvard Law Review* 131 (1) (2017): 1, 7.
- <sup>17</sup> *Ibid.*, 72.
- <sup>18</sup> *Ibid.*, 78.
- <sup>19</sup> Emily S. Bremer, “The Unwritten Administrative Constitution,” *Florida Law Review* 66 (3) (2014): 1215, 1250–1252.
- <sup>20</sup> Gillian E. Metzger and Kevin M. Stack, “Internal Administrative Law,” *Michigan Law Review* 115 (8) (2017): 1239, 1248; and Christopher J. Walker and Rebecca Turnbull, “Operationalizing Internal Administrative Law,” *Hastings Law Journal* 71 (5) (2020): 1225.
- <sup>21</sup> Metzger and Stack, “Internal Administrative Law,” 1266.
- <sup>22</sup> See also John A. Rohr, *To Run a Constitution* (Lawrence: University Press of Kansas, 1986): 171 [describing the new separation of powers as “(1) the combination of powers in administrative agencies does not violate Publius’s relaxed standard of separation of powers, (2) the higher reaches of the career civil service fulfill the constitutional design of the framers by performing a balancing function originally assigned to the Senate, and (3) the career civil service en masse heals the defect of inadequate representation in the Constitution”]; and Jessica Bulman-Pozen, “Administrative States: Beyond Presidential Administration,” *Texas Law Review* 98 (2) (2019): 265, 271–272.
- <sup>23</sup> Metzger, “1930s Redux,” 78.
- <sup>24</sup> *Ibid.*, 7, 95. See also Aaron L. Nielson, “Confessions of an Anti-Administrativist,” *Harvard Law Review Forum* 131 (1) (2017): 1–2 (acknowledging that “in a world in which delegation is ubiquitous, sometimes the administrative state itself can serve an important ‘cabining’ role on the exercise of delegated power”).
- <sup>25</sup> Metzger and Stack, “Internal Administrative Law,” 1306.
- <sup>26</sup> Several scholars have questioned whether agencies have the properties claimed by the classical model of administrative law. See, for example, Daniel A. Farber and Anne Joseph O’Connell, “The Lost World of Administrative Law,” *Texas Law Review* 92 (5) (2014): 1137, 1140 [“The actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed. . . . The mismatch (or legal fictions), in turn, has consequences for the legitimacy and efficacy of the federal bureaucracy. . . . We therefore need to rethink current approaches to bureaucratic operation and oversight if we still want to achieve administrative law’s goals of transparency, rule of law, and reasoned implementation of statutory mandates”]; and Mila Sohoni, “The Administrative Constitution in Exile,” *William and Mary Law Review* 57 (3) (2016): 923, 927 (“The administrative constitution is widely hailed as a meaningful checkpoint that rationalizes and legitimates consequen-

- tial administrative action—and is also dismissed as an outmoded set of rules that no longer has real purchase on a significant set of such actions”).
- <sup>27</sup> See also Christopher C. DeMuth and Douglas H. Ginsburg, “White House Review of Agency Rulemaking,” *Harvard Law Review* 99 (5) (1986): 1075, 1081 (“Centralized review of proposed regulations under a cost/benefit standard, by an office that has no program responsibilities and is accountable only to the president, is an appropriate response to the failings of regulation. It encourages policy coordination, greater political accountability, and more balanced regulatory decisions”); and Cass R. Sunstein, “The Office of Information and Regulatory Affairs: Myths and Realities,” *Harvard Law Review* 126 (7) (2013): 1838, 1875 (discussing the role of OIRA as an “information aggregator” allowing for White House oversight of executive branch rulemaking).
- <sup>28</sup> “Executive Order 12291 of February 17, 1981: Federal Regulation,” *Federal Register* 46 (33) (1981): 13193.
- <sup>29</sup> The “regulatory philosophy” centers on the idea that agencies should regulate only when “required by law,” “necessary to interpret the law,” or necessary to address some “compelling public need.” See “Executive Order 12866 of September 30, 1993: Regulatory Planning and Review,” *Federal Register* 58 (190) (1993): sec. 1(a). Pursuant to this philosophy, the regulatory principles require an agency to, among other things, identify and assess the significance of the problem it seeks to address, assess all costs and benefits of the proposed regulation as well as regulatory alternatives, consider impacts on innovation, predictability, and distributive impacts, and “tailor . . . regulations to impose the least burden on society.” See *ibid.*, sec. 1(b)(1–3).
- <sup>30</sup> Former OIRA administrators from both Republican and Democratic administrations, while reflecting different philosophies about the role of OIRA, defend the concept of centralized review of agency regulations. See, for example, Christopher Demuth, “OIRA at Thirty,” *Administrative Law Review* 63 (2011): 15, 16 (recounting the “policy constancy across Republican and Democratic administrations” that suggests “OIRA policies and procedures have addressed a problem that is in significant respects apolitical”); Sally Katzen, “OIRA at Thirty: Reflections and Recommendations,” *Administrative Law Review* 63 (2011): 103, 105 (arguing that E.O. 12866 “put to rest or relegated to the back burner” “questions about the legitimacy of OIRA review, the integrity of OIRA review, and the appropriateness of OIRA review”); and Susan E. Dudley, “Observations on OIRA’s Thirtieth Anniversary,” *Administrative Law Review* 63 (2011): 113, 117 (describing E.O. 12866 as foundational and noting that “regardless of a candidate’s perceived views on regulations, once elected, every president since Richard Nixon has chosen to require analyses of new regulatory proposals and to authorize an entity within the Executive Office of the President to evaluate those analyses”).
- <sup>31</sup> Executive Order 12866 remains in effect, although presidents have called for its review. See, for example, “Executive Order 13258 of February 26, 2002: Amending Executive Order 12866 on Regulatory Planning and Review,” *Federal Register* 67 (40) (2002): 9385; “Executive Order 13563 of January 18, 2011: Improving Regulation and Regulatory Review,” *Federal Register* 76 (14) (2011): 3821; “Executive Order 13771 of January 30, 2017: Reducing Regulation and Controlling Regulatory Costs,” *Federal Register* 82 (22) (2017): 9339; and “Memorandum of January 20, 2021: Modernizing Regulatory Review,” *Federal Register* 86 (15) (2021): 7223.
- <sup>32</sup> See “Executive Order 13771 of January 30, 2017: Reducing Regulation and Controlling Regulatory Costs,” 9339; and “Executive Order 13777 of February 24, 2017: Enforcing the Regulatory Reform Agenda,” *Federal Register* 82 (39) (2017): 12285. See also The Ed-

itorial Board, “The Great Rules Rollback,” *The Wall Street Journal*, December 25, 2017, <https://www.wsj.com/articles/the-great-rules-rollback-1514237372>.

<sup>33</sup> “Memorandum of January 20, 2021: Modernizing Regulatory Review,” 7223.

<sup>34</sup> U.S. Constitution, Article II, Section 1.

<sup>35</sup> See Rao, “Removal,” 1275.

<sup>36</sup> See, for example, Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (8) (2001): 2245, 2339–2340 (noting that regulatory review and “central presidential oversight could identify and then eliminate the inconsistencies and redundancies” and also promote “more rational setting of administrative priorities”); Steven Croley, “White House Review of Agency Rulemaking: An Empirical Investigation,” *The University of Chicago Law Review* 70 (3) (2003): 821, 873–882 (arguing that greater presidential involvement in rulemaking through OIRA is desirable); and Peter M. Shane, “Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking,” *Arkansas Law Review* 48 (1) (1995): 161, 164 (noting that “regulatory oversight, if implemented in the spirit that animates the prose of Executive Order No. 12866, promises a significant gain in political accountability”).

<sup>37</sup> See “Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies,” *Opinions of the Office of Legal Counsel* 43 \_\_ (October 8, 2019) (“OIRA’s regulatory review process, which draws on the expertise of the entire government, has come to provide an essential mechanism to ensure unity and coherence in execution of the law”).

<sup>38</sup> John McGinnis has suggested that under broad delegations, OIRA serves the same purposes as bicameralism by putting “an additional screen between government decrees and the citizen by filtering out special interest regulations from those in the public interest,” and that “the substance of the cost-benefit analysis mandated by the regulatory review order helps screen public interest regulations from those sought by special interests—an implicit objective of the original Constitution’s requirements for legislative enactments.” John O. McGinnis, “Presidential Review as Constitutional Restoration,” *Duke Law Journal* 51 (3) (2001): 901, 903–904.

<sup>39</sup> See Cass R. Sunstein, “Is Cost-Benefit Analysis for Everyone?” *Administrative Law Review* 53 (1) (2001): 299, 301–304 (“The basic idea [behind cost-benefit analysis] is that it is exceedingly difficult to choose the appropriate level of regulation without looking at both the benefit and cost sides”). See also *Business Roundtable v. Security Exchange Commission*, 647 F.3d 1144, 1148–1149 (D.C. Cir. 2011) (vacating a rule when the Securities and Exchange Commission “failed once again . . . adequately to assess the economic effects of a new rule”).

<sup>40</sup> See “Extending Regulatory Review Under Executive Order 12866,” 5–7 (concluding the president may direct independent agencies to comply with the OIRA regulatory review process and discussing the views of the Reagan and Clinton administrations that OIRA review of independent regulatory agencies would be constitutional).

<sup>41</sup> The full exploration of examples is outside the scope of this essay, so I focus on illustrative features that are discussed infrequently, if at all.

<sup>42</sup> Congress usually vests rulemaking authority in constitutional officers, most commonly the head of an agency, a principal officer who must be appointed by the president with the advice and consent of the Senate. Expertise might be the guiding light of ad-

ministration, but it must be applied to policies chosen by democratically accountable officials.

- <sup>43</sup> Some agencies have sought to reform their procedures, such as the Department of Transportation, which issued a regulation establishing practices to improve the accountability and quality of rulemaking and enforcement. See Department of Transportation and Office of the Secretary of Transportation, “Administrative Rulemaking, Guidance, and Enforcement Procedures,” *Code of Federal Regulations* (Washington, D.C.: Office of the Federal Register, 2020), sec. 5.13(b)(1)(i) (requiring, with some exceptions, that “all [Department of Transportation] rulemakings are to be reviewed and cleared by the Office of the Secretary”).
- <sup>44</sup> Statement of Hon. Neomi Rao, Reviewing the Office of Information and Regulatory Affairs: Hearing Before the Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs, Senate Hearing 115-275, 115th Cong., 2nd sess., April 12, 2018 (“As part of our reform efforts, OIRA encourages and incentivizes agencies to identify guidance that can be repealed, modified, or reissued through a rulemaking. We have also prompted agencies to begin identifying existing guidance documents and to start making such documents more readily available to the public, such as on agency websites. The identification process can be a first step to eliminating outdated or unnecessary guidance and streamlining existing requirements”); and Office of Management and Budget, Executive Office of the President, “Guidance Implementing Exec. Order 13891, Titled ‘Promoting the Rule of Law through Improved Agency Guidance Documents,’” M-20-02 (Washington, D.C.: Executive Office of the President, 2019).
- <sup>45</sup> See, for example, U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter,” April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also Jacob Gersen and Jeannie Suk, “The Sex Bureaucracy,” *California Law Review* 104 (4) (2016): 881, 908 (explaining that the Office for Civil Rights “threatened to terminate federal funding to schools unless they adopted policies and procedures that complied” with the Dear Colleague Letter’s requirements).
- <sup>46</sup> William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35 (1) (2005): 76, 91.
- <sup>47</sup> The Unified Agenda of Regulatory and Deregulatory Actions, a list of all regulatory actions planned by agencies, typically includes between three and four thousand regulations, but OIRA annually reviews only about five to seven hundred regulatory actions. See, for example, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, “Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions,” <https://www.reginfo.gov/public/do/eAgendaMain> (accessed April 24, 2021) (compiling all regulatory actions planned by each agency). See also Clyde Wayne Crews Jr., “Trump’s Final 2020 Unified Agenda on Regulatory Reform, By the Numbers,” *Forbes*, December 10, 2020, <https://www.forbes.com/sites/claydwaynecrews/2020/12/10/trumps-final-2020-unified-agenda-on-regulatory-reform-by-the-numbers/?sh=555e4cae11c8>; and Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, “Frequently Asked Questions” (accessed April 24, 2021), <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp>.
- <sup>48</sup> See, for example, Sidney A. Shapiro, “The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences,” *Wake Forest Law Review* 50 (5) (2015): 1097, 1105–1116 (explaining that “public administration expertise” is “more complex

and multifaceted than is generally understood” in part because it requires specialized expertise in “the production of needed information, the assessment of the feasibility of rules, political judgments, rulemaking management, and final decision making”).

- <sup>49</sup> See generally Sean D. Croston, “An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure,” *Administrative Law Review* 64 (1) (2012): 295 (discussing the increased use of regulatory exemptions and the procedural guidelines surrounding their use).
- <sup>50</sup> There is only a scant literature around the public choice of exemptions and my observations are drawn primarily from personal experience. See generally C. Steven Bradford, “The Cost of Regulatory Exemptions,” *UMKC Law Review* 72 (4) (2004): 857, 876 (noting the limited literature on exemptions and explaining that “the case for regulatory exemptions is more complicated” and requires considering “the transaction costs of exemptions, such as specification costs, strategic behavior, enforcement costs, and any third-part[y] information costs”).
- <sup>51</sup> See generally Aaron L. Nielson, “Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices,” Report to the Administrative Conference of the United States, November 1, 2017, [https://www.thecre.com/pdf/20171112\\_waivers.pdf](https://www.thecre.com/pdf/20171112_waivers.pdf) (discussing a survey of federal agencies on their nonenforcement practices and observing that “agency nonenforcement is . . . not monolithic”).
- <sup>52</sup> For example, a regulation to protect sea turtles required the installation of expensive equipment on shrimp trawlers but exempted small fishing boats because they had little risk of harming sea turtles and such requirements would likely drive small subsistence fisherman out of business. See “Sea Turtle Conservation; Shrimp Trawling Requirements,” *Federal Register* 84 (245) (2019): 70048. Congress also requires agencies to take into account the effect of regulations on small entities. See Regulatory Flexibility Act of 1980, Public Law No. 96–354, sec. 2(b), 94 Stat. 1164, 1165 (1980), codified as amended at 5 U.S. Code sec. 603(a) (establishing “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation”).
- <sup>53</sup> For example, regulations implementing the Affordable Care Act provided an exemption for employers with religious and moral objections from providing contraceptive services. Those exemptions were upheld by the Supreme Court. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).
- <sup>54</sup> See David J. Barron and Todd D. Rakoff, “In Defense of Big Waiver,” *Columbia Law Review* 113 (2) (2013): 265, 267 (noting an “increasingly important” but “underappreciated” delegation to agencies of “broad, discretionary power to determine whether the rule or rules that Congress *has* established should be dispensed with. It is the delegation, in other words, of the power to waive Congress’s rules”).
- <sup>55</sup> Sohoni, “The Administrative Constitution in Exile,” 923, 946–956 (“The constraints of the administrative constitution have had little purchase on the executive’s exercise of waiver and delay—powers that have become increasingly consequential”).
- <sup>56</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010); and Richard A. Epstein, “Government by Waiver,” *National Affairs*, Spring 2011, <https://nationalaffairs.com/publications/detail/government-by-waiver>.

<sup>57</sup> Ibid.

<sup>58</sup> See *Renewable Fuels Association v. HollyFrontier Cheyenne Refining, LLC*, 948 F.3d 1206 (10th Cir. 2020), certiorari granted 141 S. Ct. 974 (2021) (addressing challenge to an Environmental Protection Agency exemption for small refineries from the Clean Air Act’s renewable fuels mandate). See generally Cary Coglianese, Gabriel Scheffler, and Daniel E. Walter, “Unrules,” *Stanford Law Review* (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3701841](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701841) (describing the Environmental Protection Agency’s grant of a “financial hardship waiver” from the requirement to purchase renewable fuel credits as an example of “[u]ndue business influence” over agencies and pointing out that businesses have “incentives to seek to use [waivers and exemptions] to get out from under regulations and avoid the compliance costs that other firms must bear”).

<sup>59</sup> See, for example, Brief for Respondents at 17–18, *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (“The California regulations for which the waiver was granted directly regulate only vehicle manufacturers, who have not challenged the grant of the waiver. . . . Petitioners are not themselves the subject of the agency action being challenged, they must come forward with specific facts to demonstrate that they have an identifiable member who has suffered a redressable injury from the waiver grant”).

<sup>60</sup> The Constitution explicitly removed Congress from any role in the execution of laws, precisely because the framers thought such a dual role would distort the general law-making power: it would affect how the “general good” was ascertained by focusing on particular concerns. See Rao, “Why Congress Matters,” 8 (“Legislation can be corrupted by a focus on execution and particular applications of the law. The executive cannot make the laws because it is concerned with the particular and is not a collective representative body empowered to reflect the general will”).

<sup>61</sup> See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 196 (2012) (holding that the First Amendment’s ministerial exception barred an employment discrimination suit against a religious employer because the employee was a minister within the meaning of that exception).

<sup>62</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–692 (2014) (invalidating the application of a contraception mandate regulation to three closely held corporations because the regulation imposed “a substantial burden on religious exercise” and was not “the least restrictive means” of achieving a compelling government interest).

<sup>63</sup> See, for example, Philip Bump, “What Campaign Contributions Tell Us about the Partisanship of Government Employees,” *The Washington Post*, December 27, 2018, <https://www.washingtonpost.com/politics/2018/12/27/is-trumps-dismissal-unpaid-government-employees-democrats-accurate/> (showing that 82 percent of 2018 contributions from Treasury Department employees went to Democrats, while for Justice, Agriculture, and Homeland Security, the percentages were 79, 72, and 60, respectively); and Jonathan Swan, “Government Workers Shun Trump, Give Big Money to Clinton,” *The Hill*, October 26, 2016, <https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign> (“Of the roughly \$2 million that federal workers from 14 agencies spent on presidential politics by the end of September, about \$1.9 million, or 95 percent, went to the Democratic nominee’s campaign”).