Spring 2024

Keynote Address: "Attacking and Defending the Administrative State"

Jack M. Beermann
Boston University School of Law

KEYNOTE ADDRESS: "ATTACKING AND DEFENDING THE ADMINISTRATIVE STATE"

*Jack M. Beermann**

At the beginning of this semester I told my students at Boston University that this is the most interesting time to take administrative law since I started teaching it nearly forty years ago. Doctrines that seemed settled just a few years ago have been questioned and significant change seems to be on the horizon. Don't get me wrong, we've been here before. In the 1970s and 1980s there were a few Supreme Court decisions on separation of powers[1] that indicated the possibility of big changes, but ultimately it fizzled out into the administrative law revolution that wasn't.

Things feel a bit different now, but it's still unclear if anything major will happen. Back then, there was a group of generally conservative Supreme Court Justices who were somewhat interested in reform, but, other than Justice Scalia, none were really focused on administrative law. Now we have a group of Justices, especially Justices Kavanaugh and Gorsuch, whose identity has been or is becoming bound up with administrative law reform. We also have rumblings from the Republicans in Congress and the Federalist Society, and we have a cadre of recently appointed lower court federal judges who seem anxious to feed the Supreme Court the cases necessary to accomplish fundamental reform.

To put this in perspective, in 2018, in an Article I called, *The Never-Eending Assault on the Administrative State*,[2] written in what might be viewed as the early days of the current assault, I proclaimed "The administrative state was designed by Congress and has been resoundingly approved by the Supreme Court of the United States.... Substantive regulatory power has also been resoundingly approved by the Supreme Court, perhaps even more firmly than the structural aspects of the administrative state."[3]

In a sense, the question for today is whether this is still true. In my view, even with the rise of ardent opponents of many aspects of the administrative state, the basics are unlikely to change that much even if there are adjustments, some of them important, at the margins.

---

* Philip S. Beck Professor of Law, Boston University School of Law. Special thanks to Michael Doyle and the editors of The University of Toledo Law Review for the invitation to deliver these remarks and participate in this excellent and timely symposium. This is a lightly edited and footnoted version of my remarks and, in this format, does not include the detailed analysis that would be necessary for a complete exposition of the points made.

1. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 120-24 (1976).

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

3. *Id.* at 1602.

My measuring stick is whether after the current attack on the administrative state is over and the fog of war dissipates:

1. Will the federal government retain power over virtually all of the substantive areas it regulates today?
2. Will Congress continue to delegate substantial power and discretion to administrative agencies?
3. Will some important agencies continue to operate outside of direct presidential control?
4. Will administrative agencies retain the power to employ an adjudicatory form when enforcing federal law both in disputes between private parties and the government and disputes between two private parties in which the agency functions only in a dispute resolution capacity?

In my view the answer to all four questions is likely to be "yes." At least that's my prediction.

I must admit that my view may be the product of my general optimism or at least my sense that even today's aggressive Supreme Court is unlikely to go crazy the way that some elected officials have been willing to do in the last several years. And I recognize that the reformers are going to put up a fight, so it is important to understand why their efforts should fail, why the law should continue to recognize Congress's power to regulate through the administrative state, and why the Court should not impose limits that would cripple the ability of the federal government to regulate effectively.

Some of you are probably aware of Philip Hamburger's book, *Is Administrative Law Unlawful?*[4] With that book, Professor Hamburger became the intellectual guru of the lawyers, academics, and judges committed to gutting the administrative state. Hamburger's book is dazzling, beautifully written, and elegantly argued but it's even more of a dazzling failure for two reasons. First, it seems completely disconnected from the social and political realities under which we all live today. Second, he bases his attack on criticisms that were initially levelled at a dictatorial, hereditary monarchy and transposes them to a political system in which, by and large, those who govern are answerable to the people, where policies are dictated—and revocable—by an elected Congress and an accountable President.[5]

To quote something Oliver Wendell Holmes, Jr. said in an address on the occasion of the opening of the new building at my law school in 1897, just a few years before I arrived there:

4. PHILIP A. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

5. *See* Beermann, *supra* note 2, at 1635-51 (elaborating on these themes). *See also* Adrian Vermeule, *'No' Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547, 1547, 1566 (2015).

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since.[6]

Hamburger's book is probably the greatest violation of Holmes's admonition in the history of American Law. I quote this because although the reformers rely upon some normative elements, much of the reasoning they use is rooted in the notion of returning to the law before Congress began constructing the administrative state, a return to the original understanding of the Framers of the Constitution or fidelity to the text or spirit of the Constitution. There seems to be a religious fervor that we should return to the Garden of Eden. Whether this would actually be good for society, i.e., the value of an effective and energetic government capable of meeting the exigencies of today's world, is largely irrelevant.

I should concede that I'm no policy expert, but my working assumption is that between the federal courts and Congress, Congress is more likely to be acting to further the public good especially when the Court is so partisan and so strongly dominated by originalists.[7] Despite the reverence in which some people hold the Framers, the likelihood that adherence to their vision of effective government, created as it was for a much more agrarian society with substantial slave labor, would be closer to optimal than the vision of the current Congress seems to me to be infinitesimally small. It's not that I think current law ought to be preserved simply because it is precedent, but because between the Court and Congress, I trust Congress, even the hot mess we currently have for a Congress.

It is important to frame the ferment in administrative law in the broader social context. This is not about a moot court or a debating society, it's about the future of the country and the world. It's about the health and safety of hundreds of millions of people. It's about the ability of people to thrive despite the impediments presented by social and economic inequality. The anti-regulatory forces would sacrifice the lives of people currently saved by enforcement of the Clean Air Act,[8] the Clean Water Act,[9] and the Occupational Safety and Health Act,[10] to name a few, and whose financial well-being is protected by enforcement of financial regulations administered by the Consumer Financial Protection Bureau ("CFPB") and other agencies. And they would do so based on adherence to a combination of abstract legal principles such as originalism and separation of powers with minimal constitutional basis and even less connection to the needs of contemporary society.

I have to assume that many of the proponents of reform believe in good faith that they are following binding law and that the economic progress that would allegedly be unleashed by the easing of regulatory burdens would be worth the pain and suffering it might cause to millions of people. But I suspect that many of

---

6. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

7. *See* Jack M. Beermann, *The Immorality of Originalism*, 72 CATH. U. L. REV. 445, 447 (2023).

8. 42 U.S.C. §§ 7401-7675 (2023).

9. 33 U.S.C. §§ 1251-1389 (2023).

10. 29 U.S.C. §§ 651-678 (2023).

them, and their supporters, are motivated by the quest for profits, and wouldn't flinch even if it were shown that the costs to society outweigh the benefits to them. When administration insiders proclaim they are going to deconstruct the administrative state and banish the deep state, what they mean is a drastic reduction in regulation and empowerment of the President to shape regulatory policy to an anti-regulatory agenda without regard to the law or the welfare of those who depend on government for protection.[11] The deep state is simply the mechanisms that tethers the executive branch to the law, which extremists view as an inconvenient impediment. They reject the rule of law.

I don't mean to claim that federal regulation is perfect or always in the public interest. There are numerous examples of ineffective and unnecessary regulatory requirements.[12] But the question is whether significant reform would be an example of throwing out the baby with the bath water, and more to the point whether the Supreme Court of the United States, is the appropriate body to enact the reforms.

Let me reiterate my optimism with the following observation. It's easy to take a deregulatory position in the abstract. It's much more difficult to determine, with any confidence, that any particular reform would enhance social welfare and even more difficult to convince the powers that be in the federal government that a major reduction in or reorientation of federal regulation would be socially desirable or politically palatable. There is too much support for the status quo to imagine such major changes.

To my measuring sticks: Why do I think that substantive federal power is unlikely to be cut back significantly? Isn't there a majority on the Supreme Court willing to reduce federal control over matters that have, in recent years, been subject to federal regulation? We have evidence of this in the Court's decision limiting the reach of the Clean Water Act by reading its jurisdictional phrase "waters of the United States" narrowly.[13] Notice, however, that while the decision was unanimous, Justice Kavanaugh, joined by the liberal wing of the Court, wrote a concurrence criticizing his fellow conservatives for adopting too restrictive a standard governing the Environmental Protection Agency's ("EPA") authority

11. *See* David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 767-68 (2019).

12. It is very difficult to get a handle on just how many ineffective and unnecessary federal regulations there really are. Amid all the calls for regulatory reform and complaints about too much regulation, specific examples are rarely provided by those calling for reducing regulatory burdens. I suspect this is because the proponents of reform simply cannot identify regulations that would be viewed by a consensus of interested people as unwise. In 2019, the American Institute for Economic Research published a list entitled "The 7 Worst Ideas for Regulation This Century." David R. Henderson, *The 7 Worst Ideas for Regulation This Century*, AM. INST. FOR ECON. RSCH. (June 13, 2019), https://www.aier.org/article/the-7-worst-ideas-for-regulation-this-century/. The list includes proposed interest rate caps on credit cards, restrictions on the sale of flavored e-cigarettes to teenagers, rent control, the $15 minimum wage, and FDA requirements for reviewing drugs that have been on the market for a long time. These do not seem to be examples that would cause major economic problems even if they were in force, and the evidence against them is often subject to debate, such as the notion that banning sales of e-cigarettes to teenagers would result in them smoking more conventional cigarettes and that conventional cigarettes are more harmful than e-cigarettes.

13. *See* Sackett v. EPA, 143 S. Ct. 1322, 1344 (2023).

under the Clean Water Act.[14] This indicates that Justice Kavanaugh is open to more expansive understandings of federal agency statutory power than his colleagues, and it may indicate even greater reluctance to narrow Congress's power to enact expansive federal regulatory statutes.

The two largest substantive sources of federal power that translate into administrative law are Congress's powers to spend for the general welfare and regulate interstate commerce.[15] While these issues are not at the heart of administrative law, they provide Congress with the authority to enact virtually all of the regulatory statutes considered to be within the rubric of administrative law. And there is no strong evidence of an interest among the Justices for rejecting the last eighty years of Commerce Clause doctrine, under which Congress is understood to have virtually unlimited power to regulate economic matters with interstate effects.[16] The Rehnquist Court cut back a bit through the anti-commandeering doctrine,[17] which only increased the need to expand federal agencies, limited some aspects of the commerce power to economic transactions,[18] and otherwise reaffirmed the scope of federal power. No one seems to be agitating against that other than Justice Thomas who has been sounding that theme since the 1990s.[19]

Federal power has also been vastly enhanced by Congress's ability to impose conditions on the receipt of federal funds, which has not been questioned in recent years.[20] Programs like social security, food stamps, Medicaid, Medicare, subsidies to educational institutions, and agricultural subsidies, to name a few, are unquestionably within federal power and no one is taking aim at them as a matter of legal principle. Although the Supreme Court rejected the Affordable Care Act's Medicaid expansion as too coercive on the states,[21] there is no suggestion that this represented a generalized rejection of conditions on federal funding that allow

---

14. *Id.* at 1362 (Kavanaugh, J., concurring) ("By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.").

15. U.S. CONST. art. I, § 8, cl. 2-3.

16. *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (recognizing Congress's power to regulate self-grown wheat that might have impacts on the interstate wheat market).

17. *See* New York v. United States, 505 U.S. 144, 161 (1992); Printz v. United States, 521 U.S. 898, 916 (1997).

18. *See* United States v. Morrison, 529 U.S. 598, 617-18 (2000); United States v. Lopez, 514 U.S. 549, 559-61 (1995). These decisions held that Congress may not regulate criminal conduct based on its effects on interstate commerce, at least when the criminal conduct does not involve an economic transaction.

19. *E.g.*, *Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring).

20. *See* South Dakota v. Dole, 483 U.S. 203, 206-07 (1987).

21. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581-82 (2012). As I explained, the Court's opinion in this case makes no sense unless there is a constitutional right to government-supported health care for people who cannot otherwise afford it, which is certainly not what the Court intended. *See* Jack M. Beermann, NFIB v. Sebelius *and the Right to Health Care: Government's Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 NYU J. LEGIS. & PUB. POL'Y 277, 278 (2015).

Congress to inject federal regulatory requirements into a vast array of federally funded programs.

Perhaps the most substantial risk to the future of the administrative state is the possibility that the Court will tighten up substantially on the nondelegation doctrine and impose significant constraints on the amount and nature of discretion that Congress can delegate to agencies. This could be disastrous and would be a significant assertion of judicial power, substituting the Court's judgment for Congress's on matters fundamental to the accomplishment of federal policy. Notably, it would be without constitutional warrant—the Constitution does not prohibit the delegation of discretionary authority to agencies to carry out even the most important federal policies.[22]

Now the Court was correct in the Steel Seizure Case[23] that the President and executive branch officials may not act unilaterally without authorization from Congress unless there is a clear basis for their actions in the Constitution, because then they are not executing the law.[24] But delegation is a virtue, not a vice. Congress makes the basic decisions and allocates implementation to experts or at least to officials in an entity that is committed to the mission and designed to have the time and ability to engage in the necessary day-to-day work required to implement important programs.

Most important, invalidating delegations could be disastrous, depending on how strict the Court's new standard might be. With a closely divided Congress, it seems unlikely that it would step up and fill all of the newly recognized gaps in statutes as varied as the Communications Act, the Occupational Safety and Health Act, the Clean Water and Clean Air Acts[25] and the legions of other important federal statutes. And to what end? Protecting the American people from the unaccountable exercise of authority? But Congress is always responsible for every action taken by agencies it empowers, and it has complete power, as it has done numerous times, to alter and revoke delegations of authority. This seems like a pure power grab by the Court in the name of deregulation when the people don't want it and the anti-regulatory forces cannot accomplish their goals through the political system.

Now perhaps the wind has been taken out of the sails of the nondelegation push by the Court's creation and expansion of the major questions doctrine to require clear congressional empowerment before agencies take important actions.[26] But that's just as bad and, in my view, just as inconsistent with preexisting legal principles. With today's extensive monitoring of agencies by Congress, interest groups, and the press, there is no confusion about accountability and no excessive zeal in unaccountable regulation that would justify constructing

22. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 391-92, 429-30 (2017).

23. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

24. *Id.* at 585.

25. 47 U.S.C. §§ 151-646 (2023); 29 U.S.C. §§ 651-678 (2023); 33 U.S.C. §§ 1251-1389 (2023); 42 U.S.C. §§ 7401-7675 (2023).

26. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

a restrictive nondelegation doctrine or a limit on agency authority along the lines of the major questions doctrine.

Another long-time target of some reformers has been the independent agency form. All independent agencies share one feature, which is that the agency heads cannot be removed by the President without good cause, either explicitly[27] or implicitly.[28] Usually they serve for terms of years and have bipartisanship requirements. A few have funding mechanisms that do not go through Congress, like the CFPB and the Federal Reserve.[29] Others, like the International Trade Commission, are funded by Congress but, by law, go directly to Congress for funding, not through the Office of Management and Budget's ("OMB") budget process.[30] The CFPB's funding mechanism is under attack right now[31] but judging by the oral argument, it will be sustained, meaning that so long as Congress retains ultimate control, unorthodox funding methods are constitutional, and that's a good thing because when Congress chooses it, there are usually good reasons for keeping day-to-day politics as far away from the agency as possible. It is likely overall a plus when implementation of important policies is structured to reduce the opportunities for individual members or a small group of members of Congress to meddle in the implementation of federal policy.

Agency independence from direct presidential control along with terms of years and bipartisanship requirements can be important to the success of agencies that regulate in vital and often technical areas. Some reformers, under the mantle of the unitary executive,[32] find removal restrictions unconstitutional because anything that infringes on complete presidential control is inconsistent with the vesting of the executive power in the President alone. This is a fundamental misunderstanding of the Constitution and would be unhealthy for the success of agency regulation. There is no removal provision in the Constitution, and thus textualists and originalists ought to leave the matter to Congress. Professor Jed Shugerman has also completely debunked the notion that the first Congress resolved this issue in favor of complete Presidential control.[33] Therefore, the Court's recently constructed rule that all principal officers except heads of multi-member independent agencies must be freely removable by the President has no support in the Constitution, contradicts Congress's traditional control over such matters, and has even less to commend it as a matter of policy. The same is true of the Court's ban on two levels of for-cause protection, which will be put to the test

27. *See, e.g.*, 15 U.S.C. § 41 (2023) (stating FTC Commissioners are removable by the President for "inefficiency, neglect of duty, or malfeasance in office.").

28. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483 (2010) (presuming SEC Commissioners are protected from removal without cause).

29. *See* 12 U.S.C. § 5497 (2023) (applying to the CFPB); 12 U.S.C. § 243 (2023) (applying to the Federal Reserve).

30. *See* 19 U.S.C. § 1330(e) (2024).

31. *See* Consumer Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted,* 143 S. Ct. 978 (2023).

32. *See* Steven G. Calabresi & Keith H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV 1153, 1167-68 (1992).

33. *See* Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 755-64 (2023).

this Term when the Court decides whether it applies to Administrative Law Judges ("ALJ").[34] It would be a terrible blow to the fairness of administrative hearings if ALJs lose their independence, and it might present serious due process problems.

If the Court was serious when it implied in the *Seila Law* case[35] that the multi-member bipartisan independent agency is an established and appropriate feature of the administrative state because that structure provides safeguards that substitute for direct presidential control, then there's really nothing to worry about. But should we trust the Court to be true to its word? Perhaps not. There are several examples in which the Court asserts that a particular factor is important to a decision only to abandon that factor soon after. In fact, that is exactly what happened in the first case in which the Court applied *Seila Law* to an analogous, but different, agency.

In *Seila Law*, the Court stressed that it was particularly concerned with the lack of presidential control of an agency with "the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions."[36] In *Collins v. Yellen*,[37] the Court declared this factor irrelevant:

> [T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies.[38]

As Justice Gorsuch reminded us in a dissenting opinion, "We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling."[39] In other words, we are warned not to try to hold the Justices to their words.

My final benchmark, agency adjudicatory power, is less central to the future of the administrative state than the others, but it is still worth considering whether the Court might or should place significant limitations on agency adjudication. The reformers have their sights set on agency adjudication, claiming that it violates Article III for anyone in the federal government other than Article III judges to engage in adjudication. This, again, is based on a misunderstanding or misapplication of the Constitution. There is no constitutional bar and no good reason to prohibit agencies from using an adjudicatory form to make decisions.

Imagine the chaos if all agency decisions currently made in an adjudicatory form were shifted to the federal courts. To avoid that shift, the Court would have to wipe out due process protections that have been extended beyond traditional property and liberty interests to things like government benefits, licenses, and

---

34. *See* Jarkesy v. SEC, 34 F.4th 446, 463-64 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

35. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198-99 (2020).

36. *Id.* at 2200-01.

37. Collins v. Yellen, 141 S. Ct. 1761 (2021).

38. *Id.* at 1784.

39. Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

permits. And for no good reason, since there is no discernible policy reason for making the move. In the benefits area, the government's sovereign immunity rebuts any argument against agency adjudication, and with regard to licenses and permits, agency adjudication is preferable to back room decisions without an opportunity to contest the agency's reasons.

The most difficult cases involve agency adjudication of private rights, i.e., controversies between private parties for which the federal agency serves only as an adjudicatory forum. In these cases, the Court has taken care of the danger of violating the rights of litigants to an Article III forum, and the encroachments on the power of Article III courts by imposing a number of requirements. These include that the parties have a choice over whether to submit their dispute to an agency, that there be effective judicial review of the agency decision, and that agencies cannot exercise powers reserved to Article III judges, such as presiding over jury trials and issuing writs like habeas corpus.[40] This is in line with the most powerful aspect of the allocation of the federal judicial power to Article III courts—that only Article III courts can issue final, enforceable judgments. If an agency wants to enforce an order against an unwilling party, it must go to an Article III court.[41] This is a fundamental aspect of separation of powers and makes sense because agency adjudication of important private rights can become overly politicized and thus unfair.

So, based on my measuring sticks, I do not believe there will be or should be a major reorientation of administrative law that would disable the administrative state in the foreseeable future. Of course, I may be wrong—the Supreme Court may decide to curtail Congress's power to regulate and override Congress's choices of how to structure federal regulation. In my concluding remarks, I will discuss more deeply why I think the Court ought not take that step. If there is to be a reorientation of administrative law, it ought to be in the direction of enhancing the federal government's ability to safeguard and advance social welfare.

Fundamentally, the Court ought to view the administrative state as a cooperative enterprise mainly between Congress and the executive branch with judicial intervention primarily when necessary to beat back an attempt by one branch to seize power and suppress the other branch's ability to respond, and secondarily to protect private individuals and entities from arbitrary restrictions on their actions. And the Court should always have social welfare as its primary concern, not some abstract doctrine of separation of powers or originalism.

In my view, it was perfectly appropriate for the Court to prevent President Truman from seizing the steel mills[42] and it might also have been appropriate for the Fifth Circuit to put an end to the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program's rights-granting elements,[43] because in both instances the administration's claims to congressional or constitutional authorization were virtually nonexistent. But there is a big difference

40. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53 (1986).

41. *See* Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 891 (2019).

42. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952).

43. Texas v. United States, 809 F.3d, 134, 146, 186-88 (2015).

between such unilateral assertions of executive power and assertions of agency power based on statutory authorization that is fully revocable by Congress, even when the executive claims power that is not obvious from statutory text. As Chief Justice Roberts put it in one case, in the cases in which the Court invoked its major questions reasoning to deny agency authority, the agency's actions had a "colorable textual basis."[44] That should be enough. Congress and the executive branch are capable of arriving at the appropriate balance, and even the current Congress is more likely to serve the public interest than a group of nine elite lawyers.

The desirability of agency discretion to implement policy based on vague statutory authorization was recognized by scholars early in the genesis of what we now denominate the administrative state. Professor James Hart, in his 1925 Johns Hopkins University political science Ph.D. dissertation captured it well. His dissertation may have been the first extended scholarly work focusing on the administrative state. He wrote:

> [T]he fortunate use of broad generalizations in the Constitution introduces a flexibility which makes the instrument adaptable to the needs of successive generations.... [T]he legislative powers granted to Congress include the power, as being a necessary and proper means of carrying them into execution, to delegate to the Executive the function of issuing ordinances which concretize the legislative enactments.[45]

Suppose that the reformers are, however, correct, that traditional legal understandings of federal power, statutory construction, and separation of powers doctrine supports major reforms that would curtail the power of Congress to impose federal norms and would restrict Congress's ability to design agencies for optimal performance in both political and policy terms. Well then maybe it's time for new legal understandings, time to discard outdated ways of thinking about the relationship between Congress and the agencies because the old ways of thinking no longer meet society's needs.

Many of the reforms that are being pursued would instead roll back the clock, reduce federal power perhaps to regulate the national economy, hinder Congress from delegating important matters to agencies, and, in general, reduce the power of federal agencies to vigorously pursue the public welfare. As Holmes taught us, if legal traditions no longer advance social welfare, what we need is a new set of legal traditions in the form of a new administrative law in which American society recognizes Congress is in the best position to determine the nature of discretion that agencies should exercise and the extent to which they ought to be free to pursue social welfare free from direct presidential control. When the law becomes an impediment to government's pursuit of social welfare, it may be time for new law.

---

44. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

45. JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 144 (1925).