Can Americans Reconcile Our Constitutional System With an Expansive Administrative State?

by Ted Hirt

A Review of:
Bureaucracy in America: The Administrative State's Challenge to Constitutional Government, by Joseph Postell

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Note from the Editor:

This review discusses the history of the tension between constitutional and administrative government in the United States.

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• Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017), https://harvardlawreview.org/2017/11/1930s-redux-the-administrative-state-under-siege/.

• Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937 (2018), https://www.vanderbiltlawreview.org/2018/04/the-constitutional-case-for-chevron-deference/.

• Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599 (2017), https://scholarship.law.nd.edu/ndlr/vol93/iss4/9/.

• William Funk, *The Attack on Administrative Regulation*, 42 Vt. L. Rev. 427 (2018), https://lawreview.vermontlaw.edu/wp-content/uploads/2018/05/03-Funk.pdf.

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In *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*, Joseph Postell, Assistant Professor of Political Science at the University of Colorado-Colorado Springs, provides a detailed and scholarly review of our government's reliance on administrative agencies to administer benefits and regulate citizen conduct. The story he recounts is fascinating, and it manages to be both detailed and engaging.

Postell develops several themes. First, he argues persuasively "that there always has been a tension between administrative power and American constitutionalism."[1] Tracing the history of the administrative state from the founding to today, Postell challenges the thesis of some scholars that the administrative state's "crisis of legitimacy" is simply a recent phenomenon that has been ginned up by conservative critics.[2] Second, Postell contends that attempts by various progressives and modern liberals to incorporate principles of American constitutionalism into the administrative process has not resolved this tension in a satisfactory manner.[3] Postell next examines the embrace of deferential judicial review of agency action by some conservative jurists. Finally, he asks how constitutional government can be rescued from an expansive administrative state.[4]

Postell's work focuses predominantly on our nation's constitutional history and how administrative agencies have functioned within it. That context helps us understand the current crisis of legitimacy of the administrative state. Recounting the past also provides some clues to how our republic can reconcile the competing values of constitutionally required separation of powers, limited government, and government accountability on one hand, and efficiency in administration on the other.

I. From the Colonial Period to the Constitution

One might expect a history of the American administrative state to begin in 1787 with the Constitution's deliberately formulated structure of legislative, executive, and judicial powers, articulated in Articles I, II, and III of that basic charter. But Postell emphasizes that the Framers, by the time they reached the 1787 Philadelphia Convention, already would have been familiar with the exercise of administrative powers during the colonial period and at the state and national levels during and after the American Revolution.[5] These "lessons of experience" informed the debates and decisions that resulted in the Constitution.[6]

While readers are likely familiar with the rivalry between colonial legislatures and royal governors—in which legislatures asserted their own rights to tax and spend, contrary to assertions of top-down control by the British Crown—few may know that local courts were an important locus of colonial government

1 Joseph Postell, Bureaucracy in America: The Administrative State's Challenge to Constitutional Government 3-4 (University of Missouri Press, 2017) (hereinafter *Postell*).

2 *Postell* at 3-4.

3 *Id.* at 5.

4 *Id.* at 298-300, 320-22.

5 *Id.* at 13.

6 *Id.*

power.[7] Postell explains that justices of the peace functioned not only as agents of their local communities, but as one-man administrative agencies.[8] Justices of the peace regulated a wide range of conduct, including building highways, establishing inns and liquor retailers, and some food sales.[9] Postell emphasizes that, despite our current controversies, administrative law "did not start with judicial review of administrative activity; the courts were the administrators themselves."[10] And all local officials—including justices of the peace—were accountable to the citizens through frequent elections.[11]

Judicial activity in the colonial era also established a "basic principle" of American constitutionalism: that executive officers "could not be placed above liability for following the law."[12] For example, common law damages actions were available against sheriffs and jailers for wrongful conduct, and the courts refused to enforce writs of assistance, which were general warrants sought by British customs officers to search warehouses and other private property for illegal or untaxed goods.[13] Two other factors weakened administration and made it more accountable: the "absence of a powerful executive and administrative branch weakened the ability of the government to enforce law against the wishes of the community," and that phenomenon ensured that law was consistent with custom, a principle "central" to the common law.[14]

The advent of American independence led the states to experiment with new ways of exercising power. Postell notes that the revolutionary government's early experiment with Committees of Safety fell into disfavor because the Committees tried to exercise legislative and administrative power independently of state legislatures.[15] In contrast, the Continental Congress created ad hoc committees to address an array of war-related functions. The resulting "administrative sprawl" was not only inefficient, but it also mixed legislative and administrative functions.[16] When the Continental Congress established multi-member boards and committees to help conduct the war effort (raising revenue, securing munitions and supplies, etc.), it encountered a different problem: members were unaccountable.[17] But single-member boards did not pose that problem because the "concentration of accountability in a single person" and the continuity provided by that person's leadership ensured "greater energy, efficiency, and responsibility to the ends set forth by the authorizing legislature."[18]

Postell observes that several principles of administrative constitutionalism emerged from these experiences: the fact that judges could be relied upon as agents of regulation and administration, the need for administrators to be accountable to the people, the usefulness of judicial review and legal checks to guard against arbitrary administrative actions, the importance of separating administrative power from legislative interference, and the wisdom of "unitary executive structures."[19] To support this thesis, Postell cites portions of debates from the Philadelphia Convention, state ratification conventions, and the *Federalist Papers*.[20] Those debates make it clear that the Founders opted for a strong principle of non-delegation of legislative authority to the executive.[21] The Founders also rejected the notion of a Council of State that would constitute a non-unitary executive (analogous to the multi-member boards the Continental Congress rejected).[22] James Madison and Alexander Hamilton defined republicanism as a system in which government had to have an "immediate" relationship to the people, rendering government officials accountable to the latter.[23] In *Federalist 52*, Madison stated that it was "essential to liberty" that the government should have an "immediate dependence on, & an intimate sympathy with the people."[24] Postell contends that legislation by administrative agencies is inconsistent with that principle insofar as administrators are not directly (or even indirectly) elected by the people.[25] Finally, the separation of powers was a key principle undergirding the Founders' vision for government; one consequence of this is that administrative agencies should not be able to exercise multiple or "blended" powers within their organizations.[26]

II. Administrative Power in the Early Republic

After the Revolution, state and local governments continued to develop various means of deploying administrative power. For example, governments developed systems of inspection and licensing of commodities and containers, and they regulated entry into various occupations and professions.[27] The governments also regulated common carriers, chartered entities such as banks, and transportation companies such as ferries.[28] The Founding generation accepted as legitimate a range of regulation; they were

7 *Id.* at 14-15.

8 *Id.*

9 *Id.* at 15.

10 *Id.* at 16.

11 *Id.* at 20-21.

12 *Id.* at 17.

13 *Id.* at 16-17.

14 *Id.* at 18.

15 *Id.* at 22-23.

16 *Id.* at 27.

17 *Id.*

18 *Id.*

19 *Id.* at 29-30.

20 *Id.* at 30-40.

21 *Id.* at 32-34

22 *Id.* at 35-37.

23 *Id.* at 42-44.

24 *Id.* at 44 (citing The Federalist No. 52).

25 *Id.* at 44-49.

26 *Id.* at 55-56.

27 *Id.* at 61.

28 *Id.* at 61-62.

not laissez-faire ideologues.[29] But they cared about how those exercises of regulatory authority were administered and, in turn, made accountable.

In most states, authority over local issues was transferred by the state government to the relevant local governments.[30] As a result, county administrative officers held much of the administrative power that would otherwise have resided with state officials. These local officials were more likely to be directly elected or appointed by the legislature than they were to be appointed by the executive.[31] Local officials could enforce some laws through penalties imposed by an administrative officer, but more substantial penalties were dispensed in court systems.[32] Local boards of health and sanitation were created, but with circumscribed authority.[33] City councils created boards to investigate discrete social problems, such as health hazards and sanitary practices, and report back to them.[34] There was some blending of lawmaking, enforcement, and judicial powers, but the activities were local and did not pose a risk of widespread abuses of power.[35] State legislatures were disinclined to delegate authority to administrators, so they often enacted elaborately detailed specifications for how administrators were to carry out their tasks.[36] Courts continued to act as forums for private citizen enforcement of the laws and for review of the legality of administrative agency action.[37] The virtues of administration during this period included a "constrained administrative apparatus that was tightly bound to public opinion and promoted self-government at the local level," and that the system avoided the "creation of an elite bureaucracy" that would have been removed from public opinion or oversight or unaccountable to the court system.[38]

At the national level, Postell says, Congress "adhered to a nondelegation principle" and was "vigilant in retaining the power to make the law."[39] Congress legislated the routes of post roads, specified the locations of lighthouses, and the defined the responsibilities of Treasury Department officials.[40] Postell notes, but rejects, the contention of some scholars that the Steamboat Safety Act of 1852, which enacted safety measures and created an administrative inspection system, was a precursor to the modern independent regulatory commission.[41] Postell argues that, in that statute, Congress created very limited agency authority that cannot be analogized to the "expansive rulemaking powers of the modern administrative state."[42]

Also during this antebellum period, the federal government maintained the principle of the unitary executive that placed all administrative authority under presidential control.[43] Washington and his successor presidents generally adhered to this theory of administrative power.[44] And the president's power to remove subordinate officials—a power not encumbered by Congress—also was generally accepted.[45]

Courts served as enforcement mechanisms for legislation, rather than as administrative agencies as in the colonial era.[46] From reviewing Supreme Court precedent, Postell finds continuity in judicial review of executive action from the Founding to the antebellum period.[47] The Supreme Court maintained the principle of de novo review of agency action,[48] although Chief Justice Roger B. Taney suggested that some deference to agency decision-making might be appropriate.[49] But, because cases challenging agency actions usually involved requests for the extraordinary writ of mandamus, which courts are disinclined to grant when the issue involves discretionary agency acts, it is not clear if broader principles of agency deference can be derived from those court decisions.[50]

III. Post-Civil War and Progressive Era Developments

Postell devotes much of his book to describing various efforts to create administrative agencies after the Civil War.[51] Some commentators "mark the 1880s" as the decade in which the administrative state was born.[52] The 1883 enactment of the Pendleton Act, which created a competitive civil service, and the 1887 enactment of the Interstate Commerce Act, which created the Interstate Commerce Commission (ICC), are the prominent regulatory landmarks of the post-Civil War period cited for that

29 *Id.* at 62.

30 *Id.* at 64.

31 *Id.* at 63.

32 *Id.* at 65.

33 *Id.* at 66.

34 *Id.* at 65.

35 *Id.* at 66.

36 *Id.* at 67-69.

37 *Id.* at 69-71.

38 *Id.* at 72.

39 *Id.* at 75.

40 *Id.* at 76, 78.

41 *Id.* at 96-102.

42 *Id.* at 101.

43 *Id.* at 81.

44 *Id.* at 81-82

45 *Id.* at 84-89.

46 *Id.* at 89-91.

47 *Id.* at 117-24.

48 *Id.* at 117.

49 *Id.* at 120.

50 *Id.* at 120-21.

51 It is not clear why Postell does not address legal developments during the Civil War other than to note, in passing, the creation of the Department of Agriculture in 1862. *Id.* at 129. It would make sense, for example, for Postell to examine the National Bank Act of 1862 or other expansions of national power that occurred in conjunction with President Lincoln's and Congress' pursuit of victory in the war against the Confederacy.

52 *Id.* at 127.

proposition.[53] The theory is that, with these "first, albeit hesitant" steps, the federal government started along the path towards the modern administrative state.[54] Postell, however, argues that those discrete enactments do not constitute precedents for the much more ambitious expansion of agency power that was inaugurated in later decades.[55]

How momentous were these two statutes? In the Pendleton Act, Congress established the Civil Service Commission and authorized it to require competitive examinations for entry into civil service jobs.[56] Its opponents objected to the Act on constitutional grounds, not just because they wanted to maintain the political party-based spoils system.[57] The concern was that the Commission could appoint individuals who were not accountable to the people through their elected representatives.[58] Supporters of the statute responded that the reform was consistent with the preservation of republican institutions insofar as an honest civil service was essential to effective government administration.[59]

The background and legacy of the Interstate Commerce Act were more complicated. During the legislative debates, members of Congress expressed concern about the nature of the proposed ICC, including whether it would improperly assume judicial powers.[60] The ICC Act did not disturb the people's right to bring common law suits. It authorized the ICC to investigate railroads, but the ICC itself did not have enforcement powers; the agency could ask the United States Attorney to file a civil enforcement suit, and the ICC's determinations would be prima facie evidence in court.[61] The Act proscribed certain anti-competitive practices, but the ICC only could *declare* rates to be unjust and unreasonable—it had to rely on the courts to actually enforce these declarations.[62] Postell contends that the authority granted to the ICC was not an "open-ended grant of discretion," insofar as the phrase "reasonable and just" had a well-defined meaning.[63] Over time, the ICC acquired authority to issue cease and desist orders, but that authority was not self-executing.[64] In addition, the courts permitted carriers to introduce new evidence in judicial proceedings, rejecting the agency's argument that courts should simply defer to its factual determinations.[65] Courts also determined that the ICC could only issue judgments about past rates; it could not engage in prospective ratemaking.[66] From this history, Postell concludes that the ICC "was not intended to be, nor was it in its initial practice, a powerful independent regulatory commission in the progressive sense."[67] The period immediately following the Civil War, then, contrary to some popular belief, did not birth the administrative state as we know it today.

The Progressive Era, however, ushered in a sea change in administrative law and American constitutionalism, founded in part on the advocacy of reformers and like-minded scholars for fundamental reforms to the American political system, including elimination of the indirect election of Senators and institution of the initiative, referendum, and recall as democratizing measures.[68] The Progressives questioned the continued wisdom of a government conducted by elected representatives; Professor Herbert Croly, a prominent Progressive, believed that the United States should become a "more highly socialized democracy" under which there would be an "efficient national organization."[69] Other Progressive thinkers concluded that the Constitution's tripartite separation of powers was unworkable or outmoded.[70] These thinkers advocated a consolidation of powers in administrative agencies, in which experts could devise and implement policy.[71]

President Theodore Roosevelt embraced the Progressive movement,[72] and Congress enacted, among other things, the Hepburn Act of 1906, granting ratemaking and final adjudicatory powers to the ICC.[73] The Supreme Court explained that it would defer to the agency's factual determinations, but that it would decide legal issues de novo.[74] President Woodrow Wilson and some of his advisors, however, did not embrace the centralization of government envisioned by President Roosevelt's New Nationalism, under which industrial monopolies would be permitted but intensely regulated.[75] Louis Brandeis, a prominent lawyer and scholar before he became a Supreme Court Justice, was skeptical of the use of executive government power to regulate the economy or big business, preferring the use of court-based enforcement of statutes like the Sherman Anti-Trust Act.[76] In the Federal Trade Commission Act of 1914, Congress authorized the new Federal Trade Commission (FTC) to define what constituted an "unfair method of competition or deceptive act or practice,"

53 *Id.* at 127, 136-62.

54 *Id.* at 127.

55 *Id.* at 127-29.

56 *Id.* at 137, 144.

57 *Id.* at 137-41.

58 *Id.* at 142-43.

59 *Id.* at 143.

60 *Id.* at 150-52.

61 *Id.*

62 *Id.* at 153.

63 *Id.* at 154-55.

64 *Id.* at 154.

65 *Id.* at 162-63.

66 *Id.* at 163.

67 *Id.* at 164.

68 *Id.* at 167, 169-71.

69 *Id.* at 172-73.

70 *Id.* at 174-76

71 *Id.* at 174-78.

72 *Id.* at 194-96

73 *Id.* at 185-187.

74 *Id.* at 188 (citing ICC v. Illinois Central Railroad Co., 215 U.S. 452, 470 (1910) and ICC v. Northern Pacific Railroad Co., 216 U.S. 538, 543-44 (1910)).

75 *Id.* at 196-200.

76 *Id.* at 199-200.

but the FTC had to go to court to enforce that provision.[77] Postell discerns in this period some increase in judicial deference to agency decisions.[78]

IV. The New Deal and the Administrative Procedure Act

Although the administrative state established a foothold in the early twentieth century through the establishment of a few agencies like the FTC and the Federal Power Commission, President Franklin D. Roosevelt's New Deal tried to expand the administrative state "dramatically and to insulate its decisions even further from judicial oversight."[79] The New Deal "introduced a plethora of regulatory programs, each delegating broad powers to a newly-created or existing administrative body."[80] But the path to an expansive administrative state held significant obstacles, and the battles over the limits of executive agency power still resonate today.

For example, in 1935, the Supreme Court held that a provision of the National Industrial Recovery Act (NIRA) that granted the president power to prohibit the sale of certain oil products constituted an improper delegation of legislative power.[81] In the well-known case of *A.L.A. Schechter Poultry Corporation v. United States*,[82] the Court struck down a different NIRA provision that authorized the president to establish "codes of fair competition," reasoning that Congress' failure to define "fair competition" constituted an improper delegation of legislative powers.[83] In another case, the Court determined that the president's otherwise broad removal powers did not apply to members of the FTC, explaining that FTC members, unlike cabinet officers, have quasi-judicial and quasi-legislative duties, and that such expert duties had to be exercised independent of the president.[84] Postell observes that the Court's reasoning here embraced the Progressive vision of independent experts operating in an environment uncoupled from traditional notions of separation of powers.[85] Some people in the Roosevelt Administration invoked constitutional language in rejecting the proposed establishment of agencies that would be independent of the President.[86] But the Reorganization Act of 1939, which gave President Roosevelt the authority to reorganize the executive branch, exempted the most important regulatory agencies from his reorganization authority.[87]

Eventually, the Supreme Court did not stand in the way of important New Deal initiatives or other social reform legislation.[88] For example, in *National Labor Relations Board v. Hearst Publications*,[89] the Court deferred to the National Labor Relations Board's (NLRB) determination as to whether specific workers qualified as "employees" for purposes of the National Labor Relations Act.[90] Justice Rutledge opined that, although the Court would resolve questions of statutory interpretation, the Court would not substitute "its own inferences of fact" for the NLRB's.[91] The Court explained that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[92]

Two other Supreme Court-related developments in this era deserve mention as part of the context for the emerging administrative state. First, there was some expansion in the deference that courts gave to the agencies. For example, in *Crowell v. Benson*,[93] Chief Justice Charles Evans Hughes opined that Congress could give administrative agencies the power to make final determinations of fact in cases in which individual rights were adjudicated.[94] Second, some New Deal theorists thought they could use of the principle of standing, under which judicial review is available only to litigants who can demonstrate a specific injury to their interests resulting from the challenged government action,[95] to reduce judicial review of administrative actions.[96] In *Ashwander v. Tennessee Valley Authority*,[97] Justice Brandeis asserted in his concurrence that the Court had exercised caution in reviewing the validity of Acts of Congress, and had "restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions"[98]

Congress enacted the Administrative Procedure Act (APA) in 1946 because of dissatisfaction with the New Deal's vision of an expansive administrative state unchecked by judges. Readers may

77 *Id.* at 202-03.

78 *Id.* at 204-05.

79 *Id.* at 207.

80 *Id.* at 208.

81 Panama Refining Co. v. Ryan, 293 U.S. 388, 415-20 (1935).

82 295 U.S. 495 (1935).

83 *Id.* at 536-42.

84 Humphrey's Executor v. United States, 295 U.S. 602, 629-32 (1935).

85 *Postell* at 212.

86 *Id.* at 217-18.

87 *Id.* at 218.

88 *See, e.g.*, Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 460 (1937) (upholding revised version of farm bankruptcy statute); Virginian Railway Co. v. System Federation No. 40, Railway Employees, 300 U.S. 515, 553-60 (1937) (upholding Railway Labor Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-43 (1937) (upholding constitutionality of National Labor Relations Act). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393-96 (1937) (upholding state minimum wage legislation).

89 322 U.S. 111 (1944).

90 *Id.* at 131-32.

91 *Id.* at 130-31.

92 *Id.* at 131.

93 285 U.S. 22 (1932).

94 *Id.* at 53-55.

95 *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982).

96 *Postell* at 220-21.

97 297 U.S. 288 (1936).

98 *Id.* at 345-46.

be surprised to learn that prominent lawyers expressed objections to the new administrative state even at that time. In 1933, the American Bar Association's Special Committee on Administrative Law advocated transferring judicial power from administrative agencies to independent tribunals such as the courts.[99] Roscoe Pound, a Dean of Harvard Law School who had been a progressive legal theorist, spearheaded the ABA's legislative reform efforts, which culminated in the Walter-Logan Act in 1939, a bill that would have established independent review boards and provided substantial judicial review in suits challenging agency action.[100] President Roosevelt vetoed that measure, but its proponents challenged several Progressive and New Deal assumptions about administrative agencies.[101] These proponents of legislative reform wanted a separation of administrative powers from judicial powers within agencies, procedural checks on the powers of agencies that could be enforced by the courts, and more robust review by the courts of agency decisions.[102]

The 1946 debates on the APA reflected continued disagreement about administrative agencies' exercise of broad powers. Some members of Congress invoked separation of powers principles in denouncing the agencies' "usurpation" of legislative powers, and others asserted that the agencies improperly wielded judicial authority.[103] Other critics of agency power focused on the apparent lack of transparency or consistency in agency decisions, which often relied on trial examiners who made initial decisions that were later reviewed by agency heads who had not participated in the underlying trial.[104]

Ultimately, however, the APA as enacted did not meet the broad objectives of critics of the administrative state. These critics hoped that the APA was just the first step towards reform of the administrative state.[105] Postell argues that the debate leading to the passage of the APA demonstrated "a genuine consensus" among members of Congress that the administrative state needed curbs on its powers and that the administrative state "threatened basic principles of constitutional government."[106] But greater reforms did not occur and, Postell contends, there was no pronounced difference in the rigor of judicial review under the new statute.[107]

V. Liberal and Conservative Reactions to the Modern Administrative State

Liberals, having created the modern administrative state, eventually developed means—including some that relied on the protections of the Constitution—to limit that state's reach, at least where individual rights were implicated. These reformers tried to use administrative law to control the bureaucracy.[108]

The newer agencies that were established in the 1960s and 1970s, such as the Environmental Protection Agency and the Consumer Products Safety Commission, differed in focus (albeit not in impact or importance) from the predecessor agencies of the New Deal period. The older agencies like the Securities and Exchange Commission and the NLRB had focused on the regulation of the nation's economic order, while the newer agencies addressed environmental, consumer, and broader societal issues.[109] At the same time, the Supreme Court, responding to arguments that individuals who participated in government programs had procedural rights in those benefits, interpreted the Due Process Clause of the Fourteenth Amendment to require evidentiary hearings before benefits could be terminated.[110] The expansion of the administrative state also was accompanied by a reorientation in its goals, away from the Progressive notion that regulatory questions had an "objectively" correct answer, to a more ideologically-laden inquiry that focused on the "fundamental values" that transcended the administrative process.[111] At the same time, some reformers saw that agencies were vulnerable to capture by regulated industries, and they contended that part of the solution to that problem was increased judicial review of agency decisions.[112]

Some courts, especially the United States Court of Appeals for the District of Columbia Circuit, increased their oversight of agencies through expansive interpretations of the rulemaking provisions of the APA, mandating various procedures and scrutinizing agencies' decisions more rigorously.[113] Standing doctrine in the federal courts also was relaxed, easing access to the courts, sometimes by Congress, but often by the courts themselves.[114] From these developments, Postell concludes, a new vision of the administrative state emerged, one that emphasized "participatory democracy, judicial oversight, and the increased influence of interest groups in administrative decision making."[115] Under this theory, judges were viewed as "guardians" of the administrative process, and the administrative state also was being democratized, but outside the "traditional representative institutions of the Founders' Constitution."[116]

This vision, however, was unexpectedly disrupted by a "conservative counterrevolution" in which some conservative judges questioned some of the premises of the reformers' new vision. In doing so, the judges ironically strengthened the power of

99 *Postell* at 228.

100 *Id.*

101 *Id.* at 232-36.

102 *Id.* at 233-35.

103 *Id.* at 237.

104 *Id.* at 238.

105 *Id.* at 239-40.

106 *Id.* at 243.

107 *Id.* at 244-45.

108 *Id.* at 247.

109 *Id.* at 248-49.

110 *Id.* at 254 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

111 *Id.* at 250-51.

112 *Id.* at 252-53.

113 *Id.* at 256, 268-69.

114 *Id.* at 260-65.

115 *Id.* at 269-70.

116 *Id.* at 272-73.

administrators.[117] Postell notes then-Justice William Rehnquist's 1978 opinion in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*,[118] in which the Court rejected the notion that courts could supplement the procedures prescribed in the APA for the informal rulemaking process.[119] Postell asserts, however, that agencies nevertheless became more cautious about engaging in rulemakings that could be subjected to judicial review and increasingly turned to less formal means of decision-making such as "interpretative rules" and "statements of policy."[120] Postell does not endorse these methods, which he considers to be an end-run around APA requirements.[121]

Postell also points out that some conservative judges embraced the *Chevron* doctrine, under which courts defer to an agency's interpretation of ambiguous congressional language.[122] Although the *Chevron* decision was written by Justice John Paul Stevens, Postell observes that Justice Antonin Scalia endorsed *Chevron* to the extent that it represented, in his view, a proper division of authority between the executive and judicial branches.[123] Justice Scalia explained his rationale for that position in *United States v. Mead Corporation*: if Congress left an ambiguity in a statute that would be administered by the agency, courts should presume that Congress intended to give the agency discretion, "within the limits of reasonable interpretation," on how to resolve the ambiguity.[124] Congress committed both the enforcement of the statute and the "initial and primary interpretation" of the statute to the agency, not the courts.[125] Postell notes, however, that Justice Scalia explained in *Rapanos v. United States* that Congress must legislate with clarity with respect to the boundaries of federal and state authority.[126] Postell concludes that conservatives who have defended the *Chevron* doctrine have inadvertently permitted agencies to "update statutes by creative interpretation," thereby improperly appropriating legislative authority to themselves, and that agencies' ability to reinterpret their own authority typically has resulted in an expansion of that authority.[127] Agencies nimbly fill the gaps left by Congress, including by making policies that Congress never enacted.[128]

Postell points out that Chief Justice Rehnquist and Justice Scalia preferred to empower the executive branch over the judicial branch because they saw agencies—which are part of the executive branch, one of the political branches that are elected by the people—as more accountable to the people than the judiciary.[129] Postell rejoins that each branch has a critical balancing role in our constitutional system of separation of powers, arguing that the Founders would not have favored the accumulation of legislative, executive, and judicial powers in one of the political branches, as has happened in some agencies.[130] Postell also contends that agencies have been considered by some to be apolitical and thus insulated from the elected president—the source of their supposed accountability to the people.[131] The conservative counter-revolution opposing the administrative state has resulted in some cabining of agency authority through the application of administrative law, but the premises of how the administrative state governs have been left undisturbed, thus permitting, for example, broad delegations of legislative power by Congress to agencies.[132] And Postell points out that Justice Scalia's application of a majoritarian approach to the Constitution—by a strict understanding of the standing doctrine—has resulted in some restraint on judicial review.[133]

VI. What is the Way Forward?

Postell concludes that an inevitable tension exists between American constitutionalism and the administrative state, and he contends that his historical survey demonstrates that the tension has been recognized and debated across the political spectrum since the Founding.[134] But he also says that administrative law doctrines do not solve the problem of a proper allocation of powers between administrative agencies and Congress as prescribed under the Constitution.[135] Postell places some hope in recent comments by Chief Justice John Roberts and Justice Clarence Thomas that express skepticism about the asserted reach of agency powers.[136] Postell rejects the claims of some commentators that concerns about the compatibility of modern administrative government and the core principles of constitutional law have been "gradually

117 *Id.* at 282.

118 435 U.S. 519 (1978).

119 *Id.* at 542-48.

120 *Postell* at 285.

121 *Id.*

122 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

123 *Postell* at 292.

124 533 U.S. 218, 241 (2001).

125 *Id.*

126 *Postell* at 293 (citing Rapanos v. United States, 547 U.S. 715, 738 (2000)).

127 *Id.* at 295-296.

128 *Id.* at 296.

129 *Id.* at 300.

130 *Id.* at 300-01.

131 *Id.* at 301.

132 *Id.* at 304-09.

133 *Id.* at 310.

134 *Id.* at 317-18.

135 *Id.* at 318-19.

136 *Id.* at 319. Postell notes Chief Justice Roberts' dissenting opinion in *City of Arlington, Texas v. FCC*, 569 U.S. 290, 314-15 (2013), in which the Chief Justice expressed concern about the *Chevron* doctrine and "the danger posed by the growing power of the administrative state," and Justice Thomas' concurring opinion in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015), in which Justice Thomas asserted that principles of deference to agency interpretations were inconsistent with the independent judicial decision making embodied in Article III.

overcome or modified out of existence."[137] To Postell, these controversies are very much alive, and should remain so.

This review cannot do justice to the complex history that Postell recounts. That history is both needed and refreshing because Postell offers a competing vision of the place of the modern administrative state in our constitutional system. But, in my judgment, Postell does not sufficiently point lawmakers or jurists in the right direction—he does not do enough to define the appropriate balance between administrative power and checks by Congress and the courts. His goal is simply to explain and develop an historical narrative, not to prescribe solutions to the very difficult problems he describes, but his excellent historical investigation could have yielded more helpful insights for policymakers had he offered them. Postell's analysis should provoke more debate among scholars about these issues, and a more searching debate by policymakers about the role of administrative agencies in our constitutional system.[138]

137 *Id.* at 321-22 (citing G. Edward White, The Constitution and the New Deal 95 (2000)).

138 *See* Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 6 (2017) (defending the administrative state); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937, 943 (2018) (defending *Chevron* deference).