



WHAT WE TALK ABOUT WHEN WE TALK ABOUT THE RULE OF LAW IN THE ADMINISTRATIVE STATE

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I. ADMINISTRATION: SO HOT RIGHT NOW

When I told people that I studied administrative law, they used to roll their eyes at me. “The most boring subject in the world,” they’d quip. Lay people imagine dusty tomes, drab offices, and filing cabinets full of yellowing paper. Lawyers recall the *Federal Register* with its close-type print and inscrutable regulations. Administration puts

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you to sleep. It's grandma getting her Social Security check, bank transfers clearing through SWIFT, and accurate warnings on drug labels. This is hardly the province of drama and romance.

No longer. Five years ago, Gillian Metzger devoted her *Harvard Law Review* Foreword to "The Administrative State Under Siege."¹ "Anti-administrativism," she remarked, was ascendant in politics, scholarship, and even judicial opinions.² In its most extreme form, it attacked administration as "unlawful."³ Jeffrey Pojanowski has observed that, "[t]oday, there is a sense that th[e] pragmatic consensus [that governed administrative law in the past] is becoming unstable."⁴ Scholars agree: "challenges to administrative governance currently claim center stage," and have "gain[ed] more judicial and academic traction than at any point since the 1930s;"⁵ "so much in administrative law and theory" is suddenly "up for grabs."⁶

The current attack on the administrative state revolves around a series of interlocking claims about administration's excesses and improprieties.⁷ Administrative state skeptics contend, *inter alia*, that administrative agencies improperly mix adjudicatory, executive, and legislative functions; that administration springs from an unconstitutional delegation of law-making to actors outside of Congress; that

¹ Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017).

² *Id.* at 4.

³ For a reconstruction and critique of one of the most prominent such attacks, see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1548 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (observing that Philip Hamburger "calls administrative law 'unlawful'" but suggesting that the claim "is only masquerading as legal theory and should instead be understood as a different genre altogether — something like dystopian constitutional fiction").

⁴ Jeffrey A. Pojanowski, *Administrative Lawmaking in the Twenty-First Century*, 93 NOTRE DAME L. REV. 1415, 1415 (2018).

⁵ Metzger, *supra* note 1, at 8-9.

⁶ Pojanowski, *supra* note 4, at 1415.

⁷ See generally Metzger, *supra* note 1, at 8-51 (surveying contemporary anti-administrativism).

the administrative state, at least insofar as it includes independent agencies and other functionaries endowed with “for cause” removal protection, is designed in such a way that it unjustifiably insulates government actors from presidential control; that administrative law judges inside agencies lack full judicial power but nevertheless adjudicate fundamental rights; and that administrative law lets the federal government serve as a judge in its own cause.⁸

Underlying these many criticisms is one overriding critique: that the administrative state is constitutionally unsound.⁹ The analysis is usually formalist and textual.¹⁰ The written Constitution supposedly says that there should be three branches, and each should have specific powers. But the administrative state runs roughshod over those prescriptions. And while some administrative state skeptics may be motivated more by policy outcomes than constitutional theory,¹¹ the most prominent modern critics speak in a “constitutional register,” and claim to be “animate[d]” by “genuine constitutional concerns.”¹²

This formalist lament is finding a friendly reception in the federal judiciary.¹³ Lower courts, especially the D.C. Circuit, have occasionally embraced anti-administrative formalism for years now,¹⁴ and Justice Thomas has always been open to it.¹⁵ But, for the first time since the 1930s, a majority of the Supreme Court seems ready to embrace central elements of this attack. Recent decisions in *Seila Law*,¹⁶

⁸ See, e.g., PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); see also Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1632-36 (2018); Metzger, *supra* note 1, at 31-33.

⁹ See Metzger, *supra* note 1, at 6, 9, 34, 42-46.

¹⁰ See, e.g., Lawson, *supra* note 8, at 1231-32, 1232 n.9.

¹¹ See Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41-45.

¹² Metzger, *supra* note 1, at 13, 6.

¹³ See Sunstein & Vermeule, *supra* note 11, at 42-43.

¹⁴ See Beermann, *supra* note 8, at 1616-17.

¹⁵ See Metzger, *supra* note 1, at 35; Sunstein & Vermeule, *supra* note 11, at 42.

¹⁶ 140 S. Ct. 2183 (2020).

Arthrex,¹⁷ and *West Virginia v. EPA*¹⁸ have adopted a sophistic conception of the separation of powers – disconnected from the Constitution’s text, the government’s structure, and our country’s history – to generate false problems about the place of agencies in government and motivate thoroughgoing reforms in the name of “legality.” New challenges have been filed and even minor cases can spin out vituperative judicial screeds. The problem of the rule of law in the administrative state suddenly seems urgent.

II. THE POLITICAL ECONOMY OF ADMINISTRATIVE LAW

This is a peculiarly American obsession. In France, for instance, administration helps constitute the *état de droit*. Administrative tribunals are a vector through which the government acts as well as a tool to keep that action conformed to law.¹⁹ French administration is just part of French “rule of law.”²⁰ In Germany, the *Rechtstaat* has historically played a different role. According to the standard story, the German rule of law tradition was elaborated as an institutional response to check the Kaiser. In opposition to essentially monarchic claims to power, grounded in the authority of caste, the German bourgeoisie counterposed the *Rechtstaat*, grounded in the authority of reason. The rule of law was a basic part of German liberalism designed to check and cabin noble power. In a post-monarchic era, Germans worried less about checking overreaching royals than making sure administration carried forward the *Legitimationskette* – the “chain of legitimacy.”²¹ The supposed problem of the rule law in

¹⁷ 141 S. Ct. 1970 (2021).

¹⁸ 142 S. Ct. 2587 (2022).

¹⁹ See SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 10, 62 (2021).

²⁰ See *id.* at 39–40.

²¹ See *id.* at 38, 56, 96.

administration, then, is not really a universal question. At the very least, it does not occur in quite these terms in other places.

So where did our obsession come from? The question has emerged in the modern United States in conjunction with the apparent crisis of the administrative state. Perhaps it caused the crisis; perhaps the crisis has generated the question. But this only drives our search farther back. The administrative state may be under attack now, but Jack Beermann reminds us, it has “always [been] under attack.”²² Attacks on the administrative state are as old as the administrative state itself.²³

This is a product of the economics of regulation. The interests subject to regulation are powerful, and regulation is expensive for them. Thus “the subjects of regulation [always] have strong incentives to resist burdensome regulation with every available tool,” including attacks on the legality of regulation itself.²⁴ Of course individual industries may occasionally have reasons to go along with even costly regulation, especially if they are large players who have a hand in shaping those regulations in a way that might keep out competitors, or if they have worse to fear from Congress or the courts than agencies. But the basic structure of agency government throws up regular challenges to the administrative state. For a regulated party, whether to comply, challenge an individual regulation, or challenge the very foundations of a regulatory scheme is a simple question of costs and expected benefits. When the potential financial benefits of striking down all regulation could be so great, it would be foolish not to try.

This creates the opportunity for an alliance between regulated industries and ideological activists. Policy entrepreneurs might be

²² Beermann, *supra* note 8, at 1599.

²³ See generally ANNE M. KORNHAUSER, *DEBATING THE AMERICAN STATE*, 23, 28 (2015) (analyzing the theoretical tensions that traduced the administrative state from its creation).

²⁴ Beermann, *supra* note 8, at 1599.

motivated by any number of reasons, including partisan opposition to a party in power, simple careerism, or a principled commitment to a vision of good government. By partnering with a regulated industry, they can try to realize their policy goals. A regulated industry can give them funding, a platform, or even a legal vehicle through which to challenge regulatory programs. The policy entrepreneur, meanwhile, can give the regulated industry cover and credibility.

History bears out this cynical analysis. Regulated parties have sought to undermine modern administrative governance since its inception.²⁵ They have challenged individual regulatory decisions, sought to undercut funding for agencies, pushed for laws to cabin regulatory reach, and, of course, challenged the very legality of administration itself. And they have often done it in partnership with champions who cast their actions in the grander language of principle.

III. HOW TO MAKE A CRISIS

This political economy of anti-administrativism provides a useful frame for understanding why Americans are so worried about the rule of law in the administrative state. Until relatively recently, English speaking lawyers simply did not care much about the rule of law, as Brian Tamanaha has observed. "As a political ideal, the rule of law was largely neglected, taken for granted more than a subject of discussion."²⁶ It took the publication of Albert Venn Dicey's influential *Introduction to the Study of the Law of the Constitution* in 1888 to make the rule of law into a central analytic term of Anglo-American

²⁵ See KIM PHILLIPS-FEIN, *INVISIBLE HANDS*, 10, 19 (2009) (tracing the origins of anti-statist conservatism back to the reaction against the New Deal).

²⁶ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 63 (2004).

jurisprudence.²⁷ Dicey did this, Tamanaha explains, as an ideological opponent of the rise of “social welfare initiatives” in the English-speaking world at the tail end of the nineteenth century.²⁸ He was hoping to resist a policy shift and cast his objections in the language of principle.

Dicey’s argument was ham-handed and slightly xenophobic. Administration, he maintained, was fundamentally incompatible with the Anglo-American legal tradition.²⁹ It was foreign, drawn from the French *droit administratif*. And it was built around a basically illiberal understanding of government. In the Anglo-American legal tradition, independent judges summoned the common law to defend citizens from an overreaching government.³⁰ Private rights could only be invaded pursuant to judicially guaranteed due process. But *droit administratif*, Dicey maintained, offered no such protections.³¹ It grew from roots in continental absolutism. It thus risked undermining the glories of the rule of law itself.

Dicey’s proto anti-administrativism met with mixed success. It did not manage to stave off the development of the social safety net. In the United States, popular pressure for government action to address growing inequality and the ills of industrialization won out. Building on longstanding local traditions of government management of economic and social affairs, the state developed new agencies to save capitalism from self-destruction. These institutions provided the foundation for the modern administrative state.

²⁷ See *id.* On Dicey’s continued influence, see, e.g., TOM BINGHAM, *THE RULE OF LAW*, 1-8 (2010); Greg Conti, *Introduction* to ALBERT VENN DICEY, *WRITINGS ON DEMOCRACY AND THE REFERENDUM*, at xxxii-xxxiii, xxxviii-xxxix (Greg Conti ed., Cambridge Univ. Press 2023).

²⁸ TAMANAHA, *supra* note 26, at 63.

²⁹ See ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 213-16 (Liberty Fund 8th ed. 1982) (1915).

³⁰ See *id.* at 224.

³¹ See *id.* at 165-68, 221-25, 232-34, 237-38.

Yet, while they failed to forestall the growth of American administration, Dicey's arguments emboldened administration's critics. In particular, they provided a language for regulated industries, especially public utilities and large corporations subject to rate regulation, to articulate their objections to the commissions which now limited their rates of profit. To their eyes, the emerging administrative state realized Dicey's fears. By setting their rate of profit, this new government essentially took their property without due process of law. Dicey explained why this was wrong and gave them an argument to use with judges.

The rise of Diceyism profoundly affected the shape of American administrative law. As Daniel Ernst has sketched, early twentieth century judges harmonized Progressive regulation with a commitment to the rule of law through a new common law of administration which emphasized fair process and judicial review.³² This "procedural Diceyism" allowed for efficient administration while affording regulated parties an opportunity to vindicate their rights. In Ernst's apt formulation, while they might not receive a day in court, they would get a day in commission, and this, judges concluded, was all the rule of law demanded.³³

This judicial compromise proved surprisingly durable. In the 1930s, a further expansion of the administrative state brought another wave of objections to administration from business and regulated industries. Famously, the Administrative Bar Association's Special Committee on Administrative Law indicted administration in shrill language, accusing the government of dictatorship and lamenting the demise of the rule of law.³⁴ The years that followed saw a long struggle between Congress, the President, the Bench, and the

³² See DANIEL ERNST, *TOCQUEVILLE'S NIGHTMARE* 30, 37-39 (2014).

³³ See *id.* at 33.

³⁴ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1570-73 (1996).

Bar over the regime that would govern regulation. But the new law that emerged after several government studies and draft bills, the Administrative Procedure Act, looked remarkably like the pre-New Deal administrative law that has preceded it. It retained a core commitment to procedural Diceyism and judicial review as guarantees for liberal rights and the rule of law.³⁵

The Administrative Procedure Act and the logic it embodied set the terms for managing disputes over administration for the rest of the twentieth century. Struggles over administration continued, as Joanna Grisinger has described.³⁶ The desirability of expert commissions waxed and waned, as lawyers and economists questioned whether they were advancing the public interest or captured by industry. The federal government shifted from a broadly pro-regulatory posture in the postwar years to a deregulatory mission under Presidents Carter and Reagan. Yet, the basic bargain held. Voices objecting that administration violated the rule of law were marginal and marginalized. In this peaceable kingdom, judges further elaborated procedural Diceyism into the modern law of administration. Government and regulated parties continued to fight. But they fought in the language of administrative law, not against administrative law itself – or not successfully, at any rate.

This balance only broke with the recent partisan remaking of the American judiciary. This is not the place to tell the story of the rise of the conservative legal movement or its recent transformation. Antonin Scalia, standard-bearer for the second wave of movement conservative jurists, was no anti-administrativist. It would take opposition to Barack Obama and the dramatic transformation of the Republican Party, culminating in the election of Donald Trump and appointment of Neil Gorsuch, to bring anti-administrativism into the mainstream of American politics and thence American law.

³⁵ See, e.g., 5 U.S.C. §§ 553-54, 702-06.

³⁶ See, e.g., JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE* 195-99 (2012).

Today's questions about the rule of law in the administrative state are not really intellectual or legal. What we are seeing is not the recurrence of a fundamental philosophical question or the breaking through of a deep problem with doctrine. This is a manufactured crisis. It is the result of a distinctive political economy. And it owes its success to the triumph of a particular form of judicial politics. In other words, the question of the rule of law in the administrative state is really a question about power, not law. We are asking this question now because of political changes and, more pointedly, the triumph of the conservative legal movement. It has breathed new life into Dacey and allowed for a recurring objection to administration to re-emerge in a new form.

IV. STRUCTURE HAS A LOGIC THAT IS MORE POWERFUL THAN DOCTRINE

The conservative legal movement's striking success might give anti-administrativists hope. Last term's decision in *Dobbs*, overturning *Roe v. Wade* and striking down the constitutional right to abortion, was only the most high-profile illustration of that movement's far-reaching grip on judicial power.³⁷ In area after area—from gun rights to unions to the death penalty—the Supreme Court has gone about realizing Republican legal policy preferences. In the space of administrative law, it has recently taken dramatic steps, including eliminating removal protections for single-headed agencies,³⁸ threatening to revive the non-delegation doctrine, and empowering itself to strike down regulatory activity it deems too intrusive.³⁹ Anti-administrativists must feel their day is finally at hand.

³⁷ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

³⁸ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

³⁹ See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

No target looms so large for anti-administrativists as the Court's decision in *Chevron v. NRDC*.⁴⁰ The 1984 decision, a classic of administrative law, concerned the authority of the Environmental Protection Agency to interpret a provision of the Clean Air Act. But the case has earned the ire of conservative critics of the administrative state not for its disposition but its method. Where a statute is ambiguous, the Court there stated, judges should not impose their own construction of it on agencies *de novo*. Rather, they should defer to the agency's interpretation of the statute as long as that interpretation is reasonable.⁴¹

To anti-administrativists, this doctrine of *Chevron* deference epitomizes all that is wrong with the administrative state. By blessing agency statutory interpretation, *Chevron* gives agencies license to expand their own power. And it severely limits the ability of judges to check one of the most dangerous kinds of administrative overreach. Anti-administrativists never liked the administrative settlement, but at least it held out the promise of judicial review to keep agencies in line. *Chevron* seemed to undermine one half of that agreement. It was a judicial abdication of the responsibility to ensure the rule of law.

Personally, I think anti-administrativists' focus on *Chevron* is misplaced. The importance of *Chevron* has likely been overstated. By citation count, the case did have a remarkable influence. But the heyday of citations to *Chevron* likely passed years ago already. And besides, the deference doctrine *Chevron* embodied preceded it and was not seen to be something announced in a new way in the case itself. *Chevron*'s author, John Paul Stevens, famously did not initially judge the case important. When asked about it while speaking at a law school, he reportedly could not even recall its facts.

But, given their worries, anti-administrativists are not wrong to obsess about deference. The irrelevance of *Chevron* the case only underscores the importance of the approach that it embodied. Simply

⁴⁰ 467 U.S. 837 (1984).

⁴¹ See *id.* at 844.

put: the administrative state depends on deference as an institutional matter. This has been true since the beginning of the Diceyan compromise. As the judges of the 1920s realized, the administrative state was simply not compatible with a world of *de novo* judicial review.⁴² If regulated parties knew that courts would review agency actions from scratch, they would have no incentive to cooperate with agency regulators.⁴³

For their part, in a world of *de novo* review, agency regulators would lack meaningful implementation authority. They might set rates. But it would fall to life-tenured judges rather than government bureaucrats to decide what the rates would ultimately be. This would render their work essentially advisory. Judges, recognizing that legislators and executives had decided to rely on administration, refused to elaborate doctrine that would make their project impossible. Procedural Diceyism harmonized administration with Dicey's notion of the rule of law by fitting the two together.

There was an institutional imperative behind this doctrinal innovation. Given the expansion of government responsibilities, judges could not have reviewed administrative action *de novo* even if they had wanted. They simply did not have enough staff. The modern administrative state quickly dwarfed the size of the judiciary. The clutch of federal judges did not have the capacity to systematically review the volume of agency adjudications. They could, at most, review a handful of cases that, for whatever reason, might catch their attention.

When it came to the cases a court might review, the gap between the technical nature of agency administration and the generalist orientation of federal courts created its own pressure for deference. This is vividly on display in *Skidmore*, a case often presented as the anti-

⁴² See ERNST, *supra* note 32, at 32-33.

⁴³ See *id.* at 36-37.

thesis to *Chevron*. *Chevron* deference, administrative law professors teach, is obligatory where it applies, and grants agencies meaningful legal authority. *Skidmore* deference is a mere fallback. Under *Skidmore*, agency interpretations of ambiguous statutes bind courts only insofar as they have “power to persuade.”⁴⁴

Yet the *Skidmore* opinion suggests courts will be tempted to defer to agencies in all but the most unusual cases. *Skidmore* concerned the working conditions of the fire crew at a meatpacking plant in Texas. The ultimate legal question in the case was whether the time the firemen spent “waiting” in the firehall counted as “working time.”⁴⁵ But its answer turned on matters far afield from traditional Court competencies. Whether a given workman’s “waiting time” should be countable as “working hours” turned on innumerable, industry-specific factors and the details of employment contracts.⁴⁶ The telephone switchboard operator working from home and the lumber camp watchman in the off-season might not be in the same situation as the company fireman. “Waiting” for one might not be “waiting” for the other. To distinguish whose waiting should count as working required detailed knowledge of the work each performed, how much downtime they had, and the specifics of their contracts. Justice Robert Jackson’s *Skidmore* opinion recognized that the law charged courts with “the task of finding what the [employment] arrangement was.”⁴⁷ But it also acknowledged that the relevant government agencies working directly and intimately with regulated parties had the experience and expertise to assess these matters in a way the Court did not.⁴⁸ The Office of the Administrator of the Wages and Hours Division of the Fair Labor Standards Act was simply better at

⁴⁴ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁴⁵ See *id.* at 135-36.

⁴⁶ See *id.* at 136 (“We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time.”).

⁴⁷ See *id.* at 137.

⁴⁸ See *id.* at 137-38.

answering this question than the federal courts would be—and Jackson knew it.

Deference, then, is central to the administrative state, and it springs from two structural considerations. Administration does more than a few hundred federal judges could possibly review. And it concerns matters judges are simply not well equipped to evaluate. As Jackson implicitly recognized in *Skidmore*, courts defer to agencies less out of doctrine than convenience and necessity. They have to—or at least prefer to—given the kinds of questions they are asked to address. Jackson and the eight other Supreme Court Justices in Washington did not know much about firemen in Texas meatpacking plants. They would not know how to interpret the relevant statute to apply to those labor conditions. But luckily for them, the agency Administrator did.

V. IT IS HARD TO MAKE PREDICTIONS, ESPECIALLY ABOUT THE FUTURE

This greater importance for structure over doctrine has two important consequences for the continuing assault on the administrative state in the name of the rule of law. It suggests first that whether *Chevron* is ultimately overruled is almost irrelevant. As long as administration remains a core feature of American government, some form of deference will emerge.⁴⁹ You can call it *Chevron* or you can call it *Skidmore*,⁵⁰ but the basic posture of judicial deference to agency interpretations will persist.

On the other hand, and this is the second consequence, a successful attack on deference would amount to an attack on administration

⁴⁹ See Lisa Bressman & Kevin Stack, *Chevron is a Phoenix*, 74 VAND. L. REV. 465, 474 (2021).

⁵⁰ Cf. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996) (“We sometimes call it contribution, we sometimes call it bananas—what we call it is unimportant.”).

itself. To dismantle deference regimes completely will likely require taking up former Trump advisor Steve Bannon's call to "deconstruct[] the administrative state."⁵¹ And while this cannot be accomplished merely through the courts, aggressive judicial action could speed such deconstruction on its way. Already we are seeing attempts to subject vast areas of administrative policymaking to judicial control, particularly in some lower courts. If the Supreme Court endorses these power grabs, it will disempower agency action by substituting direct judicial control of administration for the compromise of procedural Diceyism.

I think this is unlikely. Procedural Diceyism works too well for too many, especially some powerful regulated parties who would prefer to work with technically sophisticated commissioners instead of generalist judges.

More probable, I think, is a partial unsettling of our administrative settlement. The Court might well take advantage of its newly announced "major questions" doctrine to subject agency action to opportunistic review. Disfavored agencies, like the EPA, and policies hostile to the Republican Party, like equity initiatives, may be disproportionately deemed "major," and so subject to searching judicial review, while favored agencies and policies, like aggressive border policies advanced by ICE, could be locked in under regimes of deference. This would allow a judiciary captured by the conservative legal movement to continue advancing movement priorities without having to dismantle the administrative state itself. It would also enable the Court to harness administration's power in pursuing the movement's aims.

This would, of course, constitute the effective end of transubstantive administrative law and further escalate the partisan

⁵¹ See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017) [<https://perma.cc/3Q8U-ECZ9>].

politicization of administrative action.⁵² If so, we have the anti-administrativists to thank for realizing their own fears. They attacked the administrative state because of its alleged incompatibility with the rule of law. But their critique has helped dismantle the basic bargain that had harmonized the two. In place of procedural Diceyism, we may face the rule of two sovereigns, a plebiscitary president and an unaccountable judiciary, neither beholden to the strictures of reasoned elaboration.⁵³

Will the anti-administrativists call this devastation “the rule of law”?⁵⁴ Administrative law professors await with bated breath. Either way, more drama and romance seem waiting ahead.

⁵² Maybe this reality is already upon us? Compare, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007), *with id.* at 553 (Scalia, J., dissenting) (disputing the scope of *Chevron* deference with respect to the EPA’s interpretation of the Clean Air Act); *Biden v. Nebraska*, 143 S. Ct. 2355, 2368-71 (2023), *with id.* at 2392-95 (Kagan, J., dissenting) (disputing the scope of the Secretary of Education’s authority under the Higher Education Relief Opportunities for Students Act of 2003).

⁵³ See Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 414-15 (2022); see also Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756 (2017).

⁵⁴ Cf. TACITUS, *AGRICOLA* (New York, Random House 1876) (“To robbery, slaughter, plunder, they give the lying name of empire; they make a solitude and call it peace.”).