Constraining the Growth of Federal Regulatory Power

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I. Summary

A. The expanding scope of federal regulatory authority, often referred to as the “Administrative State,” is viewed with deep concern by many legal scholars, regulated parties, and several members of the United States Supreme Court.

B. Our nation’s founders distrusted such concentrated power – and wisely constitutionally separated and divided government power between three co-equal branches – namely, the executive, legislative and judicial – to preclude dangerous arrogations of power within any of those separate spheres.

C. Excessive delegation of legislative authority by Congress and deferential judicial review of regulatory excursions has empowered the executive branch far beyond the founder’s intentions, and continued allegiance to such practices dilutes the democratic guarantees and political accountability necessary for truly representative government. This outline examines the current status and trends in this emerging controversy.

II. Overview of the Problem

A. As Professor Jonathan Turley has observed, the Founder’s system of checks and balances between three branches of government is increasingly undermined by the rise of a fourth branch, an “administrative state” of “sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.” Jonathan Turley, The Rise of the Fourth Branch of Government WASH. POST. (May 24, 2013). (Available at http://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html ).

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B. Although the rise of the fourth branch has occurred alongside an unprecedented arrogation of presidential power, it increasingly operates without significant presidential supervision and oversight. As a practical matter, agencies often enjoy a “significant degree of independence” despite the President’s Constitutional supervisory authority. Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001)(noting that “presidential control did not show itself in all, or even all important, regulation,” and that “no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity” making Presidential administration “more an aspiration than an achievement.”).

C. The trend is especially notable in the present Administration’s unilateral policies on immigration reform and regulation of the internet. However, the roots of the Administrative State can be traced all the way back to Theodore Roosevelt’s presidency.


E. Members of the Supreme Court are also openly questioning the Administrative State. For example, Chief Justice Roberts recently observed, “the danger posed by the growing power of the administrative state cannot be dismissed.” *City of Arlington v. F.C.C.*, 133 S.Ct. at 1863, 1877 (2013) (per Roberts, C.J., dissenting).

F. In last term’s decision reversing EPA’s overreach in greenhouse gas regulations, the Supreme Court stressed the importance of congressional clarity as a restraint on administrative adventures:

EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We
expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.

*Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014). The High Court further observed:

Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, “faithfully execute[s]” them. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. *But it does not include a power to revise clear statutory terms that turn out not to work in practice . . . Agencies exercise discretion only in the interstices created by statutory silence or ambiguity . . . .*

*Id.* at 2445-46 (emphasis added).

G. Professor Laurence Tribe’s comments to EPA’s proposed rule under Section 111(d) of the Clean Air Act also address the limits of regulatory overreach and its potential for selective enforcement:

The Proposed Rule demonstrates the risk of allowing an unaccountable administrative agency to “make” law and attempt to impose the burden of global climate change on an unlucky and unfortunate few. EPA’s singling out of a mere handful of emitters and limiting (or curtailing) their property is exactly the type of overreaching the Fifth Amendment seeks to prevent. As Justice Jackson warned,

The authority [vested by the Constitution in a federal branch] must be matched against words of the Fifth Amendment that “No person shall be …deprived of life, liberty, or property, without due process of law.” . . . One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not men, and that we submit ourselves to rulers only if under rules. *Youngstown Sheet & Tube Co. v.*
Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).


H. Clarity is not always a hallmark of the legislative process – and when ambiguities arise, whether by intent or by oversight, the opportunistic fourth branch’s interpretations typically receive deference from the courts – deference that is based on the agency’s “expertise” in construing the statutes they administer, deference in interpreting vague or ambiguous regulations it actually drafted, and even “extreme deference” to scientific conclusions made in the course of agency rulemaking.

I. One of the goals of this presentation is to explain how the American people have become entangled with these regulatory tendrils, apparently lost in a maze of their government’s own making. Surprisingly, it appears that the maze was built by our own institutions – by gradual accession and yielding of their powers, and by processes that were generally blessed by good intentions, overseen by competent public servants, and which were intended to serve the public interest.

III. The Founders’ Distrust of Unrestrained Executive Power

A. However well intended, these developments threaten to narrow the scope of our liberties, reduce the accountability of our representatives, and create dysfunctions that, in many ways, conflict with the founder’s constitutional design.

B. Our Constitution’s careful allocation of governmental powers has strong historical and theoretical roots in political philosophy. Distrust of concentrated power was one of the seminal concepts of Montesquieu’s *Spirit of the Laws*, which advocated a constitutional system of government based on “separation of powers”:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

C. It is not surprising that the justifications for “separation of powers” in the United States Constitution spring from the same concerns. During the revolutionary era, colonials plainly viewed oppression by British agents and officers as a form of “tyranny” – evils perpetrated by unelected officials not politically accountable to colonists, regarding coercive policies in which colonists had no voice.

D. The Declaration of Independence cited such undemocratic policies as evidence of “an absolute tyranny over these states,” specifying that the King “has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.” DECLARATION OF INDEPENDENCE, paras. 2, 12 (U.S. 1776).

E. After our founders experienced disenfranchisement, oppression and revolution, it is therefore not surprising that our Constitution’s “separation of powers” doctrine springs from the same concerns.

F. James Madison, widely respected as the “Father of the Constitution,” firmly agreed with Montesquieu, insisting that “[t]he combination of all powers legislative, executive, and judiciary in the same hands…may justly be pronounced the very definition of tyranny.” James Madison, FEDERALIST NO. 47.

G. To ensure that the branches maintained their distinction, the founders entrusted the courts – not the executive or legislative branches – with the authority to interpret and apply the law. Even before the Constitution was approved, Alexander Hamilton eloquently stressed the importance of the judiciary as the branch with the “final say” in interpretation of the laws:

   The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
H. Chief Justice John Marshall, writing for the United States Supreme Court, then recognized the essential doctrine of “judicial review,” which provided that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. 137, 177 (1803).

I. As a result of this ruling, the American “separation of powers” was clearly defined with a legislative branch to make the laws, an executive branch to enforce them, and a judicial branch to interpret them and to ensure that the branches confined their operations within their proper constitutional spheres.

J. In this way, the “separation of powers” doctrine avoided “tyranny” that would otherwise be risked by excessive concentration of authority in any single branch, entity or person. Supplemented by amendments, such as the Bill of Rights, the Constitution has evolved to its present form – acknowledging even greater degrees of liberty for Americans beyond those specified by the founders.

IV. The Origins of the Modern Administrative State

A. The administrative state was born when Congress decided to delegate its constitutional legislative authority to administrative agencies – essentially ceding its constitutional lawmaking authority to an unelected bureaucracy.

B. The judiciary was responsible for the next step in the evolution when it willingly abdicated its constitutional authority to decide “what the law is.” First, the judiciary began to defer to agency interpretations of laws entrusted to its administration, then to agency interpretation of its own regulations and even the agency’s scientific conclusions reached in promulgating those regulations.

C. These developments created an environment that enabled expansion of lawmaking power beyond the Framer’s original intent, threatening the constitutional “balance of powers” designed to protect citizens from inadequately controlled executive authority.

1. Abolition of the Non-Delegation Doctrine

   a. Originally, a “non-delegation” doctrine precluded legislatures from transferring their powers to others. The doctrine has strong historical roots. See, e.g., John Locke, Second Treatise of Civil Government (1690) (“The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . .”).
b. The Supreme Court recognized the “non-delegation” doctrine for over a century after the Republic was founded. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

c. But as laws became more intricate and the job of legislating more complex, the Supreme Court changed its mind – and decided that the increase in legislative activity and growth in congressional responsibilities justified abolition of the non-delegation doctrine. *See Mistretta v. United States*, 488 U.S. 488 (1989):

>[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it ‘constitutionally sufficient’ if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

d. With this ruling, Congress was empowered to create “public agencies” and to delegate lawmaking power to them, subject to the Court’s guidelines. Curiously, nothing in the Court’s ruling required the “public agencies” to be part of the Executive Branch. Congress might have avoided cross-branch delegation altogether by creating the agencies within the Legislative Branch, but apparently chose not to do so.

2. The Administrative Procedure Act (“APA”)

a. Fostered by Congress’ broad delegations of authority to administrative agencies within the Executive Branch, Presidents used their power to address and administer progressive programs to regulate broad aspects of commerce, such as antitrust, securities regulation, and the many executive programs that ultimately framed Franklin Roosevelt’s New Deal.

b. The APA was the product of a hard fought political battle over the place of the agencies in the government and the future of New Deal policies. How regulations would be reviewed by the courts and how statutory programs might be maintained and enhanced, or challenged and diminished, was a critical issue.

d. As a result, the text of the APA plainly provides that that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2006) (emphasis added).

e. Additionally the statute provides that “[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” Id. at 706(2) (emphasis added).

f. Accordingly, the text of the APA does not reserve any authority for the agencies to interpret the law, much less any true “lawmaking” power. The APA’s commands “seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative agencies.” Jack M. Beerman, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 CONN. L. REV. 779, 788 (2010) (hereafter “Beerman”).

g. Moreover, many courts, including the Supreme Court, have stressed that the language of the APA was forged from years of study and debate, and hence, its language should not be “lightly disregarded.” See, e.g., Vermont. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 523, 547–48 (1978) (noting that the APA was a legislative enactment that settled “long-continued and hard-fought” contentions); In re Lueders, 111 F.3d 1569, 1576 (Fed. Cir. 1997) (tracing the legislative history leading up to enactment of the APA); see generally, Beerman, at 788-789.

h. To the extent legislative history is appropriate to consider when the APA’s text is plain and unambiguous, the statute’s legislative history “leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it
passed the bill, the provision ‘requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions.’” John E. Duffy, Administrative Common Law in Judicial Review, 77 TEX. L. REV. 113, 193-94 (1998) (emphasis added); see also McNollgast, 15 J.L. ECON. & ORG. at 200 (“[C]ourts, not agencies, are the locus of both constitutional and statutory interpretation.”); Beerman, supra at 789.

3. Despite the APA’s Textual Commands, the Supreme Court nevertheless indulges deferential judicial review of agency interpretations of statutes and regulations.


4. Although the paths to each of these deferential perspectives differed, the origins of *Chevron* deference are illustrative. In *Chevron*, the Court signaled its intent to depart from the APA’s language when it paraphrased – rather than quoted – the APA’s standard of review. The Court stated that when Congress explicitly leaves a statutory gap for the agency to fill, “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 844 (emphasis added).

5. The *Chevron* Court’s paraphrase differs dramatically from the actual text of the APA. The text of the APA states that the reviewing court should overturn agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(1)(A) (2006) (emphasis added).

6. Contrary to the Court’s narrow paraphrase, nothing in the APA’s text or legislative history justifies constricting review only to variances with the statute under review. Such reasoning “might be appropriate with regard to a common law standard but seems beyond the proper judicial role in a statutory matter.” Beerman, supra at 791. *Chevron* gives little indication that its holding is based on the APA’s actual statutory language. See Patrick Smith, *Chevron’s Conflict with the Administrative Procedure Act*, 32 VA. TAX. REV. 813 (2013).
7. Although *Chevron*’s reasoning stresses the expertise of agencies in construing the statutes they are charged to administer as a basis for deference, the APA plainly delegates final interpretive authority to the courts – not administrative agencies. Since there is no statutory basis for superseding or diminishing the judicial role in the interpretive process, there is no justification for bypassing the judiciaries’ primary responsibility by deferential review.

8. *Auer* deference rests on even thinner ice.


   b. The reasoning underlying the criticism of *Auer* deference was powerfully expressed by Justice Scalia in his dissent in *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1341 (2013):

       While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. “When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).

   c. With this reference to Montesquieu, Justice Scalia squarely focused his reasoning on “separation of powers” principles:

       *Auer* deference encourages agencies to be “vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice and comment procedures.” . . . *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the
arrogation of power. . . .In any case, however great may be the efficiency gains derived from Auer deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.

Decker, 133 S. Ct. at 1341-42 (Scalia, J., dissenting).


e. In Perez, Justices Scalia, Alito and Thomas wrote separate concurring opinions reiterating their call for abolishing this form of deference. Most notably, Justice Scalia’s concurrence specifically noted that both Chevron and Skidmore/Auer deference can be seen as inconsistent with the terms of the APA. See Patrick Smith, Perez v. Mortgage Bankers Association: Are There Now Four Votes on the Supreme Court to Overrule Auer?, available at http://www.procedurallytaxing.com/perez-v-mortgage-bankers-association-are-there-now-four-votes-on-the-supreme-court-to-overrule-auer/

f. Significantly, Justice Scalia notes that Chevron could be seen as conflicting with the APA’s requirement that “the reviewing court shall…interpret…the statutory provisions,” but for purposes of Perez, he asserted that Auer is in conflict with the APA requirement that “the reviewing court shall… determine the meaning or applicability of the terms of an agency action.” Justice Scalia thus suggests that multiple forms of judicial deference – not just Chevron – may be unsupported by the text of the APA.

9. Baltimore Gas deference is also vulnerable.

a. In Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983), the Supreme Court endorsed the principle that courts ought to be at their "most deferential" when reviewing an agency's scientific determinations. This form of deference has been variously referred to as “extreme deference” or “super deference.” Emily Hammond Meazell, Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science, 109 Mich. L. Rev. 734 (2011).

b. In perhaps the most notable recent application of “super deference,” the D.C. Circuit gave “extreme deference” to EPA’s scientific findings regarding global climate change – even though EPA bypassed its own Science Advisory Board, which it was required to consult as a matter of law, and merely
accepted the conclusions of the United Nations climate change committee without critical review. The EPA’s epochal “endangerment finding” was ultimately confirmed without meaningful judicial review when the Supreme Court denied writ of certiorari. See Coalition for Responsible Regulation v. EPA, 684 F.3d 102 (2012), cert. denied, Oct. 15, 2013).

c. In evaluating EPA’s scientific finding, the D.C. Circuit found that “in reviewing the science-based decisions of agencies such as EPA, ‘although we perform a searching and careful inquiry into the facts underlying the agency's decisions, we will presume the validity of agency action as long as a rational basis for it is presented.’” Id. at 120, quoting Am. Farm Bureau Fed’n v. EPA, 559 F.3d 512, 519 (D.C. Cir. 2009).

d. The court also reiterated that in making that evaluation, it will "give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." Id. (quoting Am. Farm Bureau, 559 F.3d at 519) (emphasis added).

e. There are several strong arguments against the application of this scientific “shorthand” approach. Professor Meazell’s excellent article discusses some of the most prominent challenges:

   (1) Extraordinary deference as a general matter stands in tension with the expectation that courts must reinforce administrative-law values like participation, transparency, and deliberation. Meazell, supra at 739.

   (2) Administrative agencies cannot make an exclusive claim on science because science plays a legitimizing role throughout government. Suppose an administrative agency were to make a fundamental scientific error that becomes the basis of a regulation. A judicial rule requiring extreme deference—even to blatant scientific errors—would magnify those errors and produce unfair results. Id.

   (3) If fairness and rationality are both furthered when agencies capture the best that science can offer, perhaps a more searching role for the courts— one that encourages agencies’ principled use of science—is called for. Id.

   (4) Agency science is a peculiar product, quite removed from the traditional image of pure research science. It is laced with policy decisions at numerous levels, making it susceptible to misuse. Id. at 739-40.

   (5) Calls for “good” or “improved” science in agencies are often motivated by the desire to change policy outcomes rather than agencies’ use of flawed science in reaching them. Id. at 740.
f. Although scholarship regarding these arguments continues to develop, the issues have still not been developed or evaluated fully or pressed in the courts. Professor Meazell’s concerns, therefore, remain pressing:

This gap in the literature is surprising because the stakes are high. Super deference is not grounded in realistic notions of agency science; it may contribute to ossification and the science charade; and it appears to have a disparate impact on environmental law. Measured against broader administrative-law values, super deference also inhibits transparency; undermines deliberation; fails to accord with political accountability; and generally abdicates the courts’ role in the constitutional scheme by encouraging outcome-oriented review. For these and many other reasons, I contend that super deference has very little utility.

_Id._ at 738.

V. Conclusions

A. The erosion and ultimate abolition of the non-delegation doctrine opened the door for a broad expansion of executive authority over American life, fostering a migration of power from Congress – the most politically accountable branch of government – to executive agencies – the least politically accountable branch. As a result, the power of the Executive Branch has been dramatically enhanced – while its accountability has been largely extinguished.

B. At the same time, the Judicial Branch has indulged administrative decisions and regulations with increasing degrees of deferential review in statutory interpretation and regulatory interpretation – even when the regulations’ vagueness or ambiguity is created by the agencies themselves. The courts have given even greater deference to agencies’ scientific conclusions, virtually abstaining from reviewing such findings irrespective of potentially vast impacts on regulated parties, private citizens, and the American economy in general. The judiciary’s decision to remain purposefully aloof from these issues further enhances the arrogation of power by the Executive branch.

C. Based upon these developments, our Constitutional “balance of powers” is tipping inexorably toward expansive executive power – evidenced by the birth and growth of an “administrative state” – a “fourth branch” of government which receives inadequate constraint by Congress, the courts or, for that matter, the President and his officers.
D. As with inadequately disciplined children, the “administrative state” has grown into a “problem child” – a child which in the last century has developed into a threatening and politically unaccountable force which is, in many respects, the antithesis of the dynamic and interactive Republic envisioned by our system of Constitutional government.

E. Despite these dangers, members of the Supreme Court have not been silent regarding their concerns about this situation, and their repeated warnings suggest that the Court may consider the problem far bigger than isolated failures to conduct appropriate judicial review. Moreover, the growing administrative state continues to serve up examples of administrative overreach sure to provoke arguments for greater scrutiny. All signs indicate that, although the thunder has been heard, and the lightening has flashed, the full force of the storm has not yet broken. With diligent scrutiny and timely challenges, the dangerous expansion of the administrative state may yet be constrained.