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Placing the Administrative State in Constitutional Context

THE ISSUE IN BRIEF

- Federal administrative agencies today wield vast power over nearly every nook and cranny of daily life and would have been unrecognizable to the Framers of the Constitution.
- Despite a common (mis)conception that Congress makes the law, the President enforces the law, and the judiciary adjudicates disputes about the law, all three of those tasks are often handed over to federal administrative agencies. To begin, agencies make many more legally enforceable rules than does Congress. And those same agencies are also given the power to investigate compliance with and adjudicate disputes about those rules—something our Constitution would never allow Congress to do.
- The administrative state owes its theoretical underpinnings to the Progressive Era, and in particular, the progressive view that a limited federal government was no longer suitable to address the complexities of modern life. The Progressives thought that government not only needed to be bigger, it also needed to operate *differently*. Constitutional checks and balances like separation of powers and political accountability were discarded in favor of administration. As Hegelian optimists, the progressives believed that administrators would be disinterested experts above the political fray.
- Of course, the Founders instituted the very separation of powers eschewed by the Progressives precisely because they feared the inherent self-interest of man would result in "abuses of government."
- Given that the administrative state was intentionally created to supercede the Constitution, it is no surprise that the administrative state creates constitutional tensions.

THE ISSUE IN BRIEF

- First, in contrast to the Framers's view that the legislative, executive, and judicial powers should be separated in three different departments, the administrative state often consolidates *all* of the federal government's powers within a single entity.
- Second, a serious constitutional problem arises when Congress writes very broad statutes delegating to administrative agencies the authority to craft law on the most significant political, social, and economic issues of our time.
- Third, federal agencies may act outside the constitutional framework when they are unaccountable to the President and when they exercise core judicial functions.
- The people need to demand that our government roll back the administrative state and restore the separation of powers that is essential to protecting individual liberty.

EXECUTIVE SUMMARY

America's administrative state now wields vast power over nearly every aspect of daily life. From setting up a business to building a home to accessing contraceptives, it is often an administrative agency that writes, enforces, and adjudicates the legal standards that govern these activities.

This legal brief explores the problem of governance by administrative agency. First, the brief highlights how often the legal rules that affect individuals and businesses are made, not by Congress, but instead by unelected administrators. The brief then explores the Framers' views of constitutional structure, and in particular, their understanding of separation of powers and nondelegation as necessary to preserving individual liberty. Next, the brief locates the origins of the administrative state in anti-constitutional progressive thought. For the Progressives, administration, rather than republicanism, was the key to good government. Because administrators were to be neutral experts, the Progressives designed administration to be unaccountable to elected officials. They wanted a different kind of government, one where republicanism—or governance by elected representatives—didn't get in the way of efficiency.

Finally, the brief explains why the administrative state is in significant tension with the Founders' Constitution. In particular, the current administrative state contravenes the limited government envisioned by the Founders by placing all of the government's power in one branch, rather than in the three separate branches. This so-called Fourth Branch of government typically exercises legislative, executive, and judicial powers, and without much oversight by the elected branches. Further, broad and open-ended statutes passed by Congress give administrative agencies unheard of discretion to "write" the law. Practically speaking, the executive exercises little oversight over these agencies. And the Supreme Court has largely ceded the field when it comes to judicial review. While the Progressives did not care about upending the constitutional framework—they viewed the Constitution as a historical anachronism that must give way to more efficient administration—we should be wary of arguments and institutions that exchange liberty for efficiency. Though the vast size of our federal government makes it difficult to envision life without the administrative state, like the Founders, we should be concerned when government agencies ordinarily exercise *all* of the government's power and are often practicably unaccountable to the people and their elected representatives.

MORE INFORMATION

Across America, there is a broad and dangerous misconception about how we are governed. We believe that Congress makes the law, that the President enforces the law, and that the judiciary adjudicates disputes about the law. While that answer might satisfy a high school civics teacher, today, it is wholly inaccurate in terms of how the government actual operates. Instead, the vast bulk of "law" in the U.S.—legal rules that can be enforced against businesses and individuals—is made in the form of regulations by unelected, unaccountable bureaucrats located across hundreds of administrative agencies. More troubling still, those *same* bureaucrats are authorized to enforce compliance and to adjudicate disputes involving breaches of those regulations. And all of this occurs with little oversight from the elected branches.

Consider the recent case involving the Little Sisters of the Poor. The Little Sisters of the Poor is an international ministry of nuns in over 30 countries around the world. Their mission is to offer the elderly poor of every race and religion a home where they will be cared for as family until their death. Despite their good works, the federal government threatened to fine the Little Sisters out of existence—$75 million per year—unless they violated their deeply held religious beliefs and assisted in providing contraceptives to employees as required by the Affordable Care Act.

But here's the catch: nothing in the Affordable Care Act itself required religious employers to provide contraceptive coverage, much less forced them to do so in violation of their conscience rights. Those important decisions were made at the *administrative* level. The legislative language enacted by Congress merely provides that certain employers must provide "preventive care and screenings" for women. Congress left to an agency the power to define the term. That agency—Health and Human Services (HHS)—defined "preventive care" to include all of the FDA-approved contraceptive methods among other treatments and services.

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HHS did not initially exempt any religious organizations. Instead, after public pressure, the agency issued a historically narrow exemption for churches and their integrated auxiliaries. The Little Sisters did not qualify as an integrated auxiliary because they have the audacity to serve the poor of any denomination, not just their own. The Obama Administration then offered them an "accommodation"—they could notify the government of their religious objection and allow the government to use the Little Sister's insurance plans to provide contraceptive coverage. The Little Sisters refused to participate in the accommodation because they believed such complicity would still violate their religious beliefs.

Unfortunately, the Little Sisters of the Poor are not unique. The full force of government is often brought to bear against individuals based on an administrative rule. The Sackett Family is another example. They purchased a residential lot just north of Priest Lake, Idaho intending to build their dream home—until the EPA intervened. When the Sacketts graded their lot, the EPA issued an Administrative Compliance Order, holding the Sacketts in violation of the Clean Water Act. The EPA ordered the Sacketts to stop building and

to restore their land to its previous condition at considerable expense. If the Sacketts refused to comply, the agency threatened civil penalties of up to $75,000 per day. The Sacketts did not believe their subdivision lot to be a wetland (as required by the relevant regulation) and requested a hearing. EPA not only denied them a hearing but claimed that the Sacketts were unable to obtain *any* review of the Administrative Compliance Order. In EPA's view the Sacketts could do one of two things: (1) comply; (2) risk massive penalties.

The Sacketts experienced all this trouble, despite the fact that the statute at issue—the Clean Water Act—says nothing about wetlands at all. The statutory text speaks of "waters of the U.S." It is administrative rule that now extends that statute to an astounding percentage of land (as opposed to water) in the United States.

In each of these examples, it is far from clear that Congress would have concurred in the regulatory action. Congress has not legislated discrimination against religious ministries who serve those outside their denomination, nor has Congress prohibited building near a wetland. And yet the Little Sisters of the Poor and the Sackett family faced dramatic legal consequences—consequences that would have shuttered their doors and prevented them from building their dream house—because of agency action. The regulations promulgated by HHS and the EPA have the same effect on ordinary individuals as would legislation, especially because they come with stringent fines and penalties.

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Indeed, rule by administrative agency is the order of our day. Each year, agency administrators issue upwards of 3,500 regulations, about one-third of which substantively affect the way citizens order their affairs. By contrast, Congress usually enacts fewer than one hundred statutes per year.

In short, as Chief Justice Roberts of the United States Supreme Court put it, the administrative state "wields vast power and touches almost every aspect of daily life." And there is no end in sight; the Affordable Care Act itself creates or redefines dozens of agencies. In fact, the federal bureaucracy is so vast that the government itself has trouble counting the number of agencies. The Competitive Enterprise Institute notes that various government sources disagree mightily over the number of federal agencies—ranging from 60 to 430.

Given that federal agencies now wield unmistakable power over "every nook and cranny of daily life," it is important to understand how agencies operate and where they fit within the constitutional framework. To begin, we will look at the Founders' constitutional vision, and in particular the separation of powers and nondelegation principles embodied in the Constitution. We will then look at how the administrative state developed, and in particular, the Progressive anti-constitutional theory that gave rise to it. Finally, we will evaluate the constitutionality of the current administrative state.

I. The Founders' Vision

The current administrative state would be a huge surprise to the Founders. They simply did not envision a federal bureaucracy of the current order. But what about the constitutional framework? Can it accommodate the administrative state, or are their significant tensions with the administrative state woven into the fabric of the Constitution? This section describes two such tensions that put the administrative state on tenuous footing: separation of powers and nondelelegation.

A. Separation of Powers

Central to the Founders' protection of individual liberty was a constitutional framework meant to separate government's powers. Under the constitutional design, government authority would be exercised by three co-equal branches of government. The division of powers—legislative, executive, and judicial—among those branches was intended to protect individual liberties by making it more difficult to abuse governmental power.

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By 1787, as a result of the failure of state governments, there was agreement that even representative democracy required checks on the concentration of power in any one branch of government. As James Madison put it, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."

The Founders were heavily influenced by the 18th century political philosopher, Baron de Montesquieu, who advocated for separate spheres of governmental authority. He believed that the separation of powers preserves individual liberty by placing checks on each individual branch. According to Montesquieu, the division of power among the three branches formed a natural state of "repose or inaction." This was critical for individual liberty because it was only when all three branches acted in concert that the government could curtail individual liberty.

Echoing these views, the Federalist Papers time and again reinforce the Framers' commitment to a government of limited, separated powers. In Federalist 47, James Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." In Federalist 48, James Madison argues that, while connected, the separate branches of government must remain distinct. Because "power is of an encroaching nature," each branch must have a "constitutional control" or check against the other branches. For Madison, the consolidation of government power was indefensible: "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."

Madison continued his refrain in Federalist 51, in which he argues that separated powers are "essential to the preservation of liberty." Madison worried about "a gradual concentration of the several powers in the same department," and believed that such "usurpations" would be guarded against by separated powers.

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal], and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

In short, the Founders viewed separation of powers as necessary for the protection of individual liberty and critical to the constitutional design. As the late Justice Scalia put it, "Without a secure structure of separated powers, our Bill of Rights would be worthless."

B. Non-Delegation Doctrine

Not only does the Constitution divide governmental powers among three separate branches, it vests different powers in these separate institutions. Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article II provides that "the executive Power shall be vested in a President of the United States of America." Article III specifies that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

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Because the national government is a limited one, and authorized to exercise only enumerated constitutional powers, these Vesting Clauses are thought to grant exclusive power. Congress is constitutionally authorized to exercise "all legislative Powers," the President is authorized to exercise "the executive Power," and the federal courts are authorized to exercise "the judicial Power." But Congress may not adjudicate cases, nor may the judiciary legislate.

Indeed, the 1780 Massachusetts Constitution spelled out the nondelegation principle in detail: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

That is, the very design of the Constitution suggests that the powers given to one branch—executive, legislative, or judicial—must not be exercised by a different branch. Of course, there's some play in the joints. The Founders recognized that it is not always easy to determine, for example, the line between legislation and enforcement, but clearly sought to keep these spheres separate.

This principle of nondelegation as applied to legislation can be traced to John Locke's writing in 1609:

> 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. . . . And when the people have said, "We will submit to rules, and be govern'd by laws made by such men, and in such forms," nobody else can say other men shall make laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

To summarize briefly, the Framers of the Constitution designed a government that would be divided into three separate branches. Importantly, these three separate branches would exercise separate and distinct spheres of governmental authority. They were not to share or delegate their constitutional authority. This division was necessary, the Founders believed, to safeguard individual liberty.

Yet the current administrative state looks nothing like this. Indeed, a wholly new "branch of government" has been created. This so-called fourth branch of government, the administrative state, often exercises all three of the separate governmental functions—it legislates, executes, and adjudicates. Meanwhile, the three constitutional branches of government often have little, if any, authority over agency action.

II. The Progressive Background

So, if the Administrative State was not contemplated by constitutional design, how did we get here? We owe it in large measure to the Progressives. To be sure, the administrative state exploded during the New Deal, and later during the Great Society period of the 1960s and 70s, but it owes its theoretical underpinnings to Progressive thought. The theory underlying the administrative state is important for understanding how the administrative state fits—or doesn't fit—within the constitutional framework. In looking at its roots, the conclusion that the administrative state was concocted not to make government work better, but rather to make it work differently is inescapable.

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For the Progressives, a limited government stood in the way not only of a vastly expanded federal bureaucracy tasked with regulating far more conduct than previously imagined, but also of the Progressive view of the best *kind* of government. The Progressives believed that *administration* was a better mechanism to govern than *republicanism*. The idea was that a class of disinterested experts, rather than elected politicians, should be empowered to decide the pressing issues of the day, because they would be better able to deal with the complexities of modern life. These administrators, moreover, would be superior to constitutional governance, because the agencies would consolidate all three governmental functions within one unit. And, by design, they would be unaccountable. Modern regulation was to be based on expertise, and as such, freed from political influence.

The Progressive argument for administrative power and independence was based in Hegelian optimism. This philosophy, developed by German philosopher Georg Wilhelm Friedrich Hegel, asserted that humankind was getting nobler and less self-interested. Therefore, Progressives believed administrative salary and tenure were all that was required to obtain selfless service. Administration was to be entirely divorced from political influence; not because of the very real danger of cronyism, but instead because administrators would be disinterested experts above the political fray.

Yet the Framers of the Constitution instituted the very separation of powers eschewed by the Progressives precisely because they feared the inherent self-interest of man would result in "abuses of government." Indeed, in Federalist 6, the Founders make quick work of the idea of human impartiality, noting that such notions were "far gone in utopian speculations." And in Federalist 51, Madison explained that government powers must be distributed among the several branches because of human flaws: "If angels were to govern men, neither internal nor external controls on government would be necessary."

Make no mistake, the Progressive view of administration was one they saw as being at odds with the Constitution. The Progressives thought that limited government might have been fine for the Eighteenth Century, but that constitutional restrictions on government power had no place in the modern era with its more complicated problems. In their view, the Founders lacked foresight and were wrong to shackle future generations with limited government.

Specifically, constitutional accountability, separation of powers, and nondelegation principles interfered with their power to govern. Woodrow Wilson, for example, blamed separation of powers theory for the inflexibility of national government. He believed that administrators should be handed all of the government's authority—the ability to legislate, enforce, and adjudicate—and "free[d] from the idea … of checks and balances." Indeed, in 1914, influential Progressive author Herbert Croly described "a fourth department of the government" that "does not fit into the traditional classification of governmental powers. It exercises an authority which is in part executive, in part legislative, and in part judicial…. It is simply a convenient means of consolidating the divided activities of the government for certain practical social purposes."

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That the new theory of administration was outside the Constitution did not seriously trouble the Progressives who viewed "reverence" for the Constitution as "superstitious." They were early proponents of a living (changing) constitution. Woodrow Wilson, for instance, rejected a "Newtonian" view of constitutionalism that took text and history seriously in favor of a "Darwinian" perspective that adjusted the meaning of the Constitution to address new problems.

III. Why the Administrative State Tests Constitutional Limits

The administrative state today is not rooted in Founding principles. As one liberal Supreme Court Justice put it, the administrative state "with its reams of regulations would leave [the Framers] rubbing their eyes." But where do the constitutional tensions lie?

At the outset, we ought be concerned about the vast scope of authority exercised by the supposedly limited federal government. Additionally, much of this governing goes on outside of the three branches, leading Professor Gary Lawson to argue that "the modern administrative state openly flouts almost every important structural precept of the American constitutional order." More specifically, Congress often delegates broad authority to legislate to administrative agencies, in tension with Article I. Further, those agencies exercise significant authority that is not under the direct control of the President, in tension with Article II. In a constitutional trifecta of sorts, the same agencies often exercise the judicial power, in tension with Article III. And finally, agencies often consolidate legislative, executive, and judicial functions in the same entity, in tension with separation of powers principles.

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A. Consolidation of Governmental Powers

The most distinctive feature about the modern administrative state is that it consolidates all three of the constitutional governmental functions into a single agency. As scholars sympathetic to the modern administrative state recognize, "Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange commission—exercises *all three* of the governmental functions the Constitution so carefully allocated among Congress, President, and Court." Agencies exercise legislative power by enacting regulations with the force of law; they exercise executive power by monitoring compliance with those regulations; and they exercise judicial power by adjudicating enforcement actions and imposing sanctions.

Professor Gary Lawson's description of the powers held by the Federal Trade Commission is illustrative:

> The [Federal Trade] Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place

> before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.

Such a set-up is far from the framers' design of a liberty-preserving system of checks and balances.

B. Article I

Under the non-delegation principle, Congress cannot delegate to another branch the power to make the law. Of course, some exercises of policy discretion fall within the executive power to administer the law. An executive agency would have some discretion in administering a statute, but that power is not without limit.

Yet Congress often leaves to agencies the power to promulgate important and sensitive regulations. And the Court has ceded its oversight role as well. While there is some reason to think that the Court may be reining in extreme agency overreach, the Supreme Court has largely abandoned the nondelegation principle. The Court has been open about its pragmatic rationale; in *Mistretta v. United States*, for example, the Court explained that its decision upholding the controversial independent counsel statute was "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."

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As a result of its view that the federal government cannot survive without agencies, the Court has upheld unbelievably broad statutes as consistent with Article I. In *Yakus v. United States*, 321 U.S. 414, 420 (1944), the Court upheld a delegation to fix commodity prices that in the Price Administrator's judgment "will be generally fair and equitable." In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Court upheld a granting to the Federal Communications Commission the authority to write regulations that advanced the "public interest." All that the Court typically requires is that Congress lay out an "intelligible principle." And it has gone so far as to say that only if "there is an absence of standards" for guiding the agency, would the delegation be impermissible.

C. Article II

Even though administrative agencies often legislate and adjudicate, they fit most comfortably within the executive branch. As such, they are tasked with aiding the President in implementing the law. Yet the President often exercises little (or even no) power over agency decisions. Some agencies, so-called

independent agencies, are specifically housed outside the executive department, and are thus practicably independent from presidential oversight. In these agencies, an agency head may not be removed for policy differences, but only because of gross misconduct.

Even those agencies housed within the Executive Department, like the Environmental Protection Agency and Health and Human Services, have a significant degree of independence. As Justice Kagan wrote before being nominated to the Supreme Court, "no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity." Justice Breyer has similarly opined that "the president may not have the time or willingness to review [agency] decisions." President Truman famously lamented his authority over administrative agencies by explaining, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."

D. Article III

Administrative agencies often adjudicate disputes about agency regulations. The Supreme Court has suggested that such adjudication is constitutional so long as administrative decisions are reviewable by an Article III appellate court. All this is well and fine, but appellate review is costly, and since administrative decisions receive deference, there is a significant question as to whether Article III appellate review is as demanding as it ought to be.

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To begin, the predicate facts that the agency must find to establish a violation are generally subject to deferential review that require Article III courts to affirm agency factual determinations if they are supported by "substantial evidence." The Article III Court does not get to make up its own mind.

Further, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court laid down a highly deferential standard for reviewing agency regulations. In the absence of a clear statutory directive, the Court *presumes* that Congress intended to delegate its authority to legislate to the agency, and as a result, the federal courts are required to defer to the agency's interpretation of the statute.

This standard leaves broad policy discretion to the agency. Courts are required to defer to any "permissible construction of the statute" offered by the agency even if it is not the best reading of the statute. If Congress speaks to the precise question, that's the end of the matter. But whether by design or default, Congress often writes in broad brush and bold strokes, and thus congressional delegations to agencies are often ambiguous—expressing "a mood rather than a message." Where Congress fails to speak to "the precise question," an agency's interpretation has the full force and effect of law—and individuals have no choice but to comply.

CONCLUSION

In short, as the Supreme Court put it, the Framers could hardly have envisioned today's "vast and varied federal bureaucracy" and the authority administrative agencies now hold over our economic, social, and political activities. Given all this authority and deference, it's important to place administrative agencies in the constitutional framework. So, what did the Framers think of administrative agencies? The answer is that they didn't. And what the Constitution does say puts administrative agencies on very shaky footing indeed. Although the Progressives may not have worried about stretching the Constitution to achieve their policy aims, we should care deeply about the limits of the Constitution. The Founders wisely separated government powers, seeing divided authority as necessary to preserving individual liberty. By giving unelected administrators all of that authority at once, and without much practicable oversight, we run the risk of allowing just the sort of tyranny that concerned our forefathers.