Independent® Women's Forum

Rethinking Administrative Deference

EXECUTIVE SUMMARY

- The most important protections contained within our Constitution are not located within the Bill of Rights—as great as those protections are—but rather found within the structural provisions that limit the authority of government.
- The Framers viewed the separation of power among three co-equal branches as essential to protecting individual liberty. Each branch would act as a check on the other branches, and without the concerted action of all three branches, individual liberty could not be curtailed.
- The administrative state does not fit comfortably within the structural protections of the Constitution. Not only does this extra-Constitutional branch exercise powers that are in part legislative, in part executive, and in part judicial, but individual agencies often combine all three of these governmental powers within a single agency.
- The time may have come for the Supreme Court to address some of these concerns.
- Justice Neil Gorsuch, the newest member of the Supreme Court, has been skeptical of the broad powers of the administrative state, and in particular, judicial doctrines that require Article III courts to defer to agency interpretations of statutes.

MORE INFORMATION

Introduction

We are taught in our high school civics classes that Congress makes the law, the President enforces the law, and federal courts interpret the law and apply it to particular cases. However consonant this idea of governance may be with our Constitution, it is not the way we are governed in America today. Instead, it is the federal agencies that promulgate regulations with the force of law; it is the federal agencies that enforce those regulations; and it is the federal agencies that interpret the law and apply it to particular cases. In short, to **quote Chief Justice Roberts**, the administrative state "wields vast power and touches almost every aspect of daily life."

"The administrative state does not fit comfortably within a constitutional framework that preserves individual liberty by separating power among three co-equal branches."

The administrative state does not fit comfortably within a constitutional framework that preserves individual liberty by separating power among three co-equal branches. The Framers viewed as dangerous the accumulation of power within one branch of government and sought to divide power both vertically and horizontally.

The Supreme Court has in recent years grown more skeptical about the accretion of power within federal agencies. Individual justices have expressed dismay at the consolidation of so many powers within a single entity, at the reams of regulations that have the force of law, and in particular, at doctrines that require federal courts to defer to agency interpretations of statutes. With the confirmation of Justice Gorsuch, those who have concerns about the administrative state have a new ally on the Supreme Court. The time may have come for the Supreme Court to rethink administrative deference.

The Genius of the American Constitution

The genius of the American Constitution lies not so much in its Bill of Rights—though its protections are crucial—but rather in its structure. As the Framers recognized, it was not uncommon for the most tyrannical of governments to possess magnificent documents

that purported to protect the very best of individual freedoms, like our Bill of Rights' protection of the right to conscience, the right to be free from unreasonable searches and seizures, and the right to trial by jury. These protections, however, were too often ignored by a centralized government.

The Framers' response to government's tendency to accumulate and abuse power is perhaps the reason our Constitution endures. The Framers of the Constitution were heavily influenced by the writings of the French political philosopher Montesquieu. Montesquieu argued that individual liberty was best protected by separate spheres of government authority.

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Indeed, by 1787, as a result of the failure of state governments and the not-too-distant memory of the English Crown, "there was a widespread consensus that a system of separated powers—even one that was predicated on representative democracy—required effective checks on the accumulation and concentration of power in any one branch."

The Federalist Papers time and again praise the value of separated powers. In Federalist 47, Madison argues that "[n]o political truth is certainly of greater intrinsic value," than the separation of powers. For Madison, it was imperative that each branch of government remain distinct. He and the other Framers of the Constitution were well aware that government "power is of an encroaching nature."

Given all of the Framers' emphasis on separated powers, it is no surprise that they were suspicious of the consolidation of governmental power. Although there would necessarily be some play in the joints, each branch was directed to exercise specific constitutional authority, and not to encroach upon the authority exercised by sister branches. As James Madison wrote in Federalist No. 47 the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

The Framers thus had the foresight to divide political power. They divided government authority first horizontally, among three separate but equal branches, and second, vertically between the federal and state governments. The Constitution thus divides the powers of the federal government among three co-equal branches. Congress is given the power to enact legislation; the President the power to sign legislation and to enforce the law; and the judiciary the power to interpret the law and decide cases and controversies. This division of authority was intended to protect individual liberty—abuses by one branch could be checked by the other branches, and it was only when all three branches acted together that individual liberty might be forfeited.

Justice Gorsuch & Administrative Law

Given the structural Constitution, it is no surprise that an originalist like Justice Gorsuch is skeptical of certain aspects of administrative law. In his writing on the Tenth Circuit Court of Appeals, then-Judge Gorsuch expressed particular concern over Supreme Court case law that requires the federal courts to defer to an agency's interpretation of a statute.

At the heart of the dispute lies a 1984 case known as ***Chevron***. In that case, the Supreme Court laid down a highly deferential standard for reviewing agency regulations. The idea was that when Congress writes an open-ended statute, it intends to delegate some of its legislative authority to the agency. Given this implicit delegation of legislative authority, the federal courts were to defer to the agency's interpretation of the statute.

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In most cases, Chevron involves two steps. Chevron Step One asks whether the statute is ambiguous. If the statute is not ambiguous, then Congress has clearly spoken, and there is no need to defer to an agency's interpretation. If, however, the statute is ambiguous, then reviewing courts must defer to the agency's interpretation of that statute. The Court presumes from Congress's silence an intent to delegate its authority to create legal rules to the agency. Thus, in Chevron Step Two, reviewing courts ask whether the agency's interpretation is a reasonable one. This leaves broad policy discretion to the agency. The agency interpretation need not be the

best interpretation of the statute or the one the court would have reached, it need only be a "permissible construction of the statute."

The *Chevron* doctrine not only leaves broad policy making authority to administrative agencies, but it has been expanded beyond its initial contours. Since 1984, *Chevron* has been expanded to require federal courts to defer to an agency's interpretation of its own regulations. This means that the agency both authors the regulation and gets deference as to what it means. *Chevron* also has been extended to require federal courts to defer to an agency's interpretation of a statute, even if a federal court—even the Supreme Court—has interpreted the statute to mean something different. Thus, an agency may revise the Supreme Court's interpretation of what a statute requires. Finally, although we are normally told an agency possesses only that authority granted by Congress, *Chevron* has been applied to require federal courts to recognize an agency's interpretation of their own jurisdiction under a statute. So, in the face of an ambiguous statute an agency may police its own jurisdictional boundaries, interpret its own regulations, reverse its own determinations of what a statute requires, and sit as a council of review after the Supreme Court has declared what the law is.

> "...that Chevron and follow-on cases 'permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power... seems more than a little difficult to square with the constitution of the framers' design."

The newest member of the Supreme Court, Justice Neil Gorsuch, has expressed some concern over all of this. In an August 2016 case, then-Judge Gorsuch concurred in his own opinion in a case called ***Guiterrez-Brizuela v. Lynch***.

Judge Gorsuch began with the structural Constitution, writing that the fact that *Chevron* and follow-on cases "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power ... seems more than a little difficult to square with the constitution of the framers' design."

Then-Judge Gorsuch had two concerns with Chevron's deference requirement. First, Judge Gorsuch argued that Chevron was in tension with the very statute that requires federal courts to review agency action, the Administrative Procedure Act (APA). The APA requires federal courts to "interpret … statutory provisions" and to overturn agency action inconsistent with its interpretation of the statute. Yet *Chevron* requires that federal courts defer, rather than interpret.

Judge Gorsuch also suggested that *Chevron* may have constitutional implications. First, Article III requires that federal courts interpret the law. But *Chevron* is a judge-made doctrine that, in Judge Gorsuch's view, calls for the "abdication of the judicial duty" to interpret law. This is no small thing. Article III provides that "all judicial power" resides in the federal courts and this division of governmental power is critical to the Framer's Constitution. While Congress makes the law, and the President enforces it, it is the judiciary's province to "say what the law is." Further, as Judge Gorsuch argued, the Constitution does not contemplate Article III courts delegating their power "to say what the law is" to the Executive Branch vis-à-vis administrative agencies. One of the main points of separated powers was to ensure that the branch that enforces the law is distinct from the one that interprets it. This interpretive authority is how Article III courts act as a check on the other constitutional branches.

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Justice Gorsuch also has concerns about *Chevron's* underlying premise: That by enacting ambiguous legislation, Congress meant "to 'delegate' to the executive the job of making reasonable 'legislative' policy choices." Normally, an agency does not have any authority unless Congress has conferred power upon it, but *Chevron* upends all of that, suggesting that silence is itself a vesting of authority. Even more fundamentally, there may be a problem, Justice Gorsuch believes, in allowing Congress to delegate so much of its legislative authority to the Executive Branch. To house the authority to make law and the authority to interpret law within the same branch of government gives short shrift to the separation of powers principles that our Founders thought critical to preserving individual liberty.

CONCLUSION

As the Supreme Court has acknowledged, we might have a hard time functioning without the administrative state. But acknowledging that administrative agencies are a large part of the government today does not freeze in place administrative law doctrines that are in tension with other statutes or the Constitution. *Chevron*'s command of deference allows an Executive Branch agency to overrule a judicial interpretation, it accepts an agency's determination of its own jurisdiction, and it allows an agency to both make law (in the form of regulations) and to say what that law means. Maybe, as Justice Gorsuch wrote in *Gutierrez*, "the time has come to face the behemoth."