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# Regulators Can't Be Trusted to Self-Regulate

## High Court Can Halt Expansion of Administrative State

**by**

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The problem with today's federal agencies is not that they regulate too little; it's that they regulate too much.

During each year of Barack Obama's presidency, more than 3,500 new rules have been adopted. In each of the past two years, the Federal Register has totaled more than 82,000 pages, the most since the last year of Bill Clinton's presidency.

Most significantly, by some estimates, the costs imposed on the private sector by all these regulations are claimed to be in the range of $1.8 trillion annually.

Of course, many regulations are necessary and proper to protect the health and safety of the American people. Still, plenty overreach, often the result of overzealous bureaucrats at federal agencies seeking to expand their regulatory empires.

Fortunately, there is some basis for optimism that a regulatory reckoning of sorts may occur.

On Jan. 16, the Supreme Court will hear arguments in a little-watched case, City of Arlington v. Federal Communications Commission (FCC), which could – depending on the outcome – provide some meaningful constraint on unduly expansive bureaucratic power.

In the case, city officials in Arlington, Texas, sued the FCC over the agency's imposition of rules limiting the time jurisdictions could take in responding to requests for zoning approval of new wireless towers. The city claimed that in setting such limits, FCC exceeded the authority of its charter.

The City of Arlington, one of the most important administrative law cases of the last quarter-century, presents just one heretofore unresolved question: Should a court accord so-called "Chevron deference" when it reviews a federal agency's decision interpreting the bounds of its own statutory authority? The answer should be no.

In 1984, in the seminal Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. case, the Supreme Court held that when a court reviews an agency's interpretation of a statute, if the intent of Congress is clear, that is the end of the matter. Congress' intent is key. However, if the statute is ambiguous, then the court must give "controlling weight" – which quickly came to be known as Chevron deference – to the agency's interpretation, as long as it is reasonable.

The Chevron deference doctrine is rooted in constitutional separation of powers principles that were intended by the Founders to prevent abuse of power by promoting political accountability. The primary justification for the deference requirement was based on the idea that in our tripartite constitutional system, the political branches – Congress and the chief executive – should make policy choices, not the judiciary. As the court explained in Chevron, "An agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of policy to inform its judgments."

This is proper, the court said, because "while agencies are not directly accountable to the people, the chief executive is, and it is appropriate for this political branch of the government to make such policy choices."

In other words, when a statute delegating authority to an agency is ambiguous or silent – say, for example, regarding the extent to which certain entities should be regulated – separation of powers principles require the politically accountable executive branch, rather than the judiciary, to decide issues of statutory interpretation.

Suppose the question, instead, is whether an agency possesses any authority at all to regulate the entities it claims are subject to its statutory jurisdiction. Should a reviewing

court defer to the agency's own interpretation of its jurisdiction? This is the question the court will decide in City of Arlington.

Both logic and separation of powers principles should dictate that Chevron deference doesn't apply in this situation.

As a logical matter, Chevron deference can only apply to an agency's decision if Congress has, in fact, delegated the agency authority over the matter. As the Supreme Court has made clear in post-Chevron decisions, the deference framework is not applicable unless Congress actually intended to delegate interpretative authority to the agency. Presumably, this is what the court meant in Chevron itself when it referred to an agency exercising policymaking responsibilities "within the limits of that delegation."

The very separation of powers principles upon which the Chevron deference doctrine primarily rests should mean that such deference doesn't apply to agencies' interpretations regarding the bounds of their own authority.

In our constitutional system, it is Congress' responsibility to make policy judgments, even if only broadly, so that the people can hold their elected representatives accountable for such judgments. These certainly include judgments about whether Congress has delegated agencies any regulatory authority at all.

If agencies themselves are allowed, by virtue of receiving extraordinary judicial deference, to presumptively resolve statutory ambiguities over the outer bounds of their own power, then it is far easier for legislators to avoid political accountability for decisions Congress makes regarding the expansive reach of the regulatory state. Finally, if agencies' decisions about the scope of their own jurisdictions are given "controlling weight" under the Chevron doctrine, the bureaucratic imperative naturally will be for officials to continue enlarging the limits of their regulatory authority.

The Supreme Court has an opportunity in the City of Arlington case, consistent with foundational separation of powers principles, to put some constraints on the seemingly unstoppable expansion of the administrative state. Let's hope it does so.

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