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Reconciling Administration and Constitutionalism in Early America

by

Joseph Postell *

Introduction and Summary

Defenders of the modern administrative state frequently adopt one of two conflicting views about the role of regulation and administration in early America. On the one hand, many scholars suggest the administrative state is a modern necessity that is required by the complexity and scope of modern governmental problems. This view assumes that early America was relatively unregulated, and that new and unprecedented problems of industrialization and urbanization made the modern regulatory state necessary. According to this position, the administrative state is a departure from the practice of early American politics, but it is one that is required by modern circumstances.[1]

On the other hand, other defenders of the administrative state have noted that regulation and administration played a relatively significant role in early American governance. In their

[1] For instance, *see* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

view, the administrative state is consistent with the institutional framework of early American regulatory policy.[2]

These two views are united in attempting to ground the legitimacy of the administrative state. But they are in disagreement about whether early American policy can serve as a guide to understanding the way the administrative state should operate today. The second position, which acknowledges the extent of regulation and administration in early America, has the better understanding of American history. Yet it draws the wrong conclusions from that history.

Instead of proving that the administrative state is consistent with early American approaches to administration, early examples of regulation show an alternative path. This alternative provides for regulation and administration, but within the basic framework established by the U.S. Constitution. This paper seeks to explain the early American approach to regulation and administration, which differed at the state and national levels, in order to show the basic parameters of this alternative approach to regulation in today's administrative state.

The modern administrative state is characterized by the exercise of expansive regulatory power by unelected administrative agencies. Its power is manifest through broad delegations of authority to administrative agencies by Congress, including a wide scope of agency discretion in policymaking. And the power of the modern administrative state is enhanced by judicial oversight based on a legal standard that too readily grants controlling deference to agency decisions, including judgments regarding the extent of the agency's jurisdiction.

The alternative approach to the administrative state is not unregulated, *laissez-faire* policy with minimal government. But it is significantly different than the contemporary approach to regulation. It seeks to limit discretionary power and arbitrariness, by promoting accountability (through frequent elections of local administrative officers) and by checking and limiting power through law (as was the case with state and national administration in the early days of the Republic). In this alternative approach, power ought to be carefully limited by legislatures writing specific statutes that avoid delegating legislative power to administrative officers. And judicial review ought to undertake more exacting scrutiny to ensure that administrators exercise their authority in accordance with law. These legal doctrines have largely been abandoned today, as the nondelegation doctrine is rarely followed or enforced, and courts give deference to administrative interpretations of law under the so-called *Chevron* doctrine.[3]

This approach to limiting the often overweening reach of the modern administrative state not only would protect natural rights to life, liberty, and property consistent with the Founders' vision, but it is fully consistent with American constitutionalism properly understood.

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[2] *See* especially JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

[3] This doctrine is named after the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Regulation in Early America: In Harmony with Natural Rights

In contemporary political debates, expansive regulation and the protection of natural rights to life, liberty, and property are often assumed to be at odds. When governments impose regulations on the use of property or the exercise of liberty, opponents frequently claim that regulation is a violation of basic natural rights. In many circumstances, of course, regulation may infringe upon natural rights. But in early America, regulations were understood to be in harmony with rights to liberty and property, so long as they served the common good, and regulated property that was affected with a public interest.[4]

While the scope of regulation in early America was certainly narrower than that which prevails today, it was still significant. Several examples are illustrative. In almost every state, goods such as fish, pork, lumber, tobacco, and salt were subjected to inspections before they could be sold. Licenses were required for an array of occupations, including doctors, innkeepers, and auctioneers. Liquor sales were heavily licensed. Nuisances were regulated both by common law and by city ordinances in jurisdictions as varied as Pittsburgh, PA, and Augusta, GA. These nuisance ordinances regulated the burying of the dead, the building of privies, the storage of gunpowder, and the building and maintenance of slaughterhouses and pigsties. Banks were operated under charters granted by state governments, and the charters regulated matters such as the rates of interest they could charge. Taxis and ferries, also chartered, were required to obey regulations governing rates of ferriage and public access to the services. Morals regulations governed (and typically outlawed) billiard halls, various shows, and bawdy houses.

These regulations were frequently challenged on the grounds that they infringed the rights of individual citizens by limiting their ability to use their property or exercise their liberties. When courts examined these regulations, they typically upheld them as expanding the rights of everyone by regulating the use of property affected with a public interest. As James Wilson, one of the most preeminent jurists among the Founding generation, argued, "every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state." Nevertheless, he added, "our municipal regulations concerning it are not less hostile to the true principles of utility, than they are to the superiour law of liberty." Wilson argued that these regulations were not hostile to liberty, but actually expanded liberty: "every citizen will gain more liberty than he will lose by those prohibitions."[5] Another Founder, Zephaniah Swift, argued the same: "that property may be upon a certain, permanent foundation, there have been positive rules adopted by mankind, which govern the acquisition, the use, and the disposition of it. These are

[4] For elaboration on the kinds of regulations and the rationale that early Americans offered in favor of them, *see* Joseph Postell, *Regulation during the American Founding: Achieving Liberalism and Republicanism*, 5 AMERICAN POLITICAL THOUGHT 80 (2016).

[5] James Wilson, Lectures on Law, COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall & Mark David Hall, ed., Liberty Fund 2007) 2:1132.

calculated to give the possessors a more perfect enjoyment, than can be derived from natural law."[6]

The arguments in favor of these regulations, while important, are beyond the subject of this article.[7] The important conclusion to draw from this evidence is that American government did not follow the doctrine of *laissez-faire* prior to the Civil War, and that few of the major thinkers and politicians of this period thought that regulation was necessarily in tension with the idea that government's purpose was to protect and promote natural rights. Consequently, there were many regulators in early America, and a body of administrative law emerged to limit the power of officers, ensure their accountability, and ground their authority.

Limiting and Legitimating Administrative Power

Local Officers

Many of these regulations at the local level were enacted by administrative officers rather than by legislatures. Local regulatory officers went by different names in different states. Some were called justices of the peace, others selectmen, others commissioners. In some states they were directly elected, while in others they were appointed by state legislatures.

After the conclusion of the Revolutionary War, there was a gradual and observable tendency towards more direct election of county and municipal officers. In the Northwest Territory, for example, town meetings were authorized to elect trustees, constables, road supervisors, and overseers of the poor. Indiana's first state constitution in 1816 mandated election for sheriffs and justices of the peace. Some states retained the indirect method of appointment by state legislatures, but the general tendency was to make local regulatory officers highly accountable to the people through election.

Given the great variety of arrangements that prevailed throughout the different states during the early republic, it is difficult to summarize the specific institutions used to carry out regulatory and governmental functions. However, the general principles of administrative law were relatively uniform even as the specifics varied. Alexis de Tocqueville famously described these arrangements in *Democracy in America*:

> I have already said enough, I think, to make understood the general principles on which the administration of the United States rests. These principles are applied diversely; they furnish more or less numerous consequences according to the place; but at bottom they are everywhere the same. The laws vary, their physiognomy changes; one same spirit animates them….
>
> [T]he organization of the township and the county in the United States rests on this same idea everywhere: that each is the best judge of whatever relates only to himself, and is in the best position to provide for his particular needs….

[6] ZEPHANIAH SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT (1795), 1:182.
[7] Their rationale in explained in greater depth in Postell, *supra* note 4.

> The first consequence of this doctrine has been to have all the administrators of the township and the county chosen by the inhabitants themselves, or at least to have those magistrates chosen exclusively from among them.
>
> As administrators are everywhere elected, or at least irrevocable, the result is that no one has been able to introduce rules of hierarchy anywhere. There have been almost as many independent officials as offices. Administrative power is found diffused in a multitude of hands….
>
> [G]enerally, one can say that the salient characteristic of public administration in the United States is to be enormously decentralized.[8]

In Tocqueville's view, the most significant feature of American administrative law was its decentralization and its accountability to the local populace that was regulated by the decisions of local officers. This accountability meant that most jurisdictions felt more comfortable vesting administrative officers with regulatory powers that combined legislative and administrative powers. County-level justices of the peace had powers to create by-laws and to enforce minor penalties for violations of the bylaws. As long as the penalties were minor, these penalties did not need to be adjudicated in the county-level courts.

Legislative and administrative powers were blended to a great extent in local communities in the early republic. At the same time, however, many communities began to see the problems associated with this, and to separate lawmaking, execution, and adjudicatory functions. Most Midwestern states such as Pennsylvania, Ohio, and Illinois transferred administrative functions to elected county boards of commissioners so that justices of the peace were left with only judicial powers. Massachusetts transferred administrative powers from their county courts of sessions to directly elected county commissioners in the 1820s. Thus, even though blending of powers was prevalent during the early republic, there was some awareness that as communities grew and local accountability became more tenuous, greater separation of powers should be provided.

In short, most administrative power was exerted by local officials in early America. This means that to understand early American administrative law, one must know something about these local arrangements. They were highly varied, but their basic principles were the same throughout the United States. Local officers were held highly accountable to the local constituencies they regulated, either through direct election or through appointment (of officers who came from the communities they governed). Some blending of powers in the hands of justices of the peace, town selectmen, and the like was accepted, because of the security afforded by local accountability. Gradually, greater separation of functions began to emerge as the nineteenth century proceeded, but at no point did a strict separation of powers prevail at the local level. The state and national governments, however, operated under much tighter constitutional constraints during this period.

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[8] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chicago Press 2000) 77-79.

State Legislatures

Although most of the day-to-day regulatory bylaws were enacted by local officers, there was plenty of lawmaking at the state level as well. State legislatures were involved in a variety of activities, particularly with regard to canals and other internal improvements. They regulated industries through specific charters authorizing certain activities such as banking, operating ferries, and constructing milldams.

As they addressed these issues, state legislatures generally refrained from delegating power to state agencies. As Tocqueville described: "In the New England states, the legislative power extends to more objects, than among us [in France]. The legislator penetrates in a way into the very heart of administration; the law descends into minute details…it thus encloses secondary bodies and their administrators in a multitude of strict and rigorously defined obligations."[9] State legislatures kept control of power by prescribing even minute details in the statutes they enacted. This ensured that administrators would not have too much power to go beyond what the people's representatives authorized in law.

Most commentators who reflect on state-level policies prior to the Civil War lament the stinginess of state legislatures that refused to delegate power to administrative bodies. One analysis of New York State concludes that the state legislature was "the principal regulatory agency in state government" because it governed industries through granting and enforcing charters, supervised the details of construction and maintenance of roads, the collection of taxes, and other daily affairs that might have been entrusted to administrative officers.[10] He concludes, "the doctrine of legislative supremacy and the relatively undifferentiated character of the political system in the early nineteenth century had combined to make the legislature, in a very real sense, the chief instrument of administration."[11] This was problematic because it prevented "the emergence of an administrative apparatus capable of controlling the forces unleashed by social and economic change."[12] In other words, most scholars look at the states in the early nineteenth century and regret that state legislatures were so reluctant to grant discretion to administrative bodies that could have rationally addressed the problems of the time.

Such assessments indicate that most people believed that important political decisions had to remain in the hands of legislatures, whose members were elected by the people. The nondelegation doctrine was much more widely recognized and enforced at the state level during the nineteenth century than it was at the national level.[13] The nondelegation doctrine, conceptually rooted in constitutional separation of powers, bars the legislative branch from

[9] TOCQUEVILLE, *supra* note 8, at 69.
[10] L. RAY GUNN, THE DECLINE OF AUTHORITY: PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENT IN NEW YORK STATE, 1800-1860 (1988), at 81.
[11] *Id*., at 199.
[12] *Id*., at 84.
[13] *See* Joseph Postell & Paul D. Moreno, *Not Dead Yet – Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONSTITUTIONAL STUDIES 41 (2018), at 57-60. This is still the case today. *See* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2018).

delegating its powers to another branch, to an agency, or to private entities. In short, administrative discretion was much more limited at the state level than at the local level, by legislatures that avoided delegating power and chose to make important political decisions themselves. Congressional avoidance of delegating legislative power was also the tendency at the national level.

National Administrative Law: Presidential Control of Administration

Two critical features of early American administrative law at the national level were the general acceptance of presidential control of administration and nondelegation of legislative power to administrative officers. It is true that there were some exceptions to these features. But these exceptions were so rare and minor that they do not contradict the pervasiveness of presidential control and legislative nondelegation.

Presidential control of administration was most closely associated with presidential removal of administrative officers. The Constitution addressed the appointment of administrative officers but was silent on how they would be removed from office. Alexander Hamilton suggested in *The Federalist* that the Senate would have to consent to removing administrators from their positions: "The consent of that body would be necessary to displace [officers] as well as to appoint."[14] This interpretation of the Constitution's silence would weaken the President's ability to direct and oversee the executive branch, since the President would not be able to remove a recalcitrant department head without the Senate's concurrence.

The removal power debate was a matter of considerable controversy in the First Congress, which eventually settled the matter, albeit ambiguously, in the "Decision of 1789." When the First Congress (1789-1791) turned to the establishment of the executive departments, James Madison moved that the Secretary of the Department of Foreign Affairs would be "removable by the president." It was unclear what this provision would have implied. On the one hand, it could have been read as Congress granting the President the power to fire the Secretary as a matter of discretion. On the other, it could also be read as merely acknowledging the President's inherent constitutional authority to fire administrators.

Madison's proposal launched a lengthy debate in Congress. Many argued that giving the President such control over hiring and firing of officers would recreate the conditions for monarchy, with the distribution of offices being a chief means of corruption and consolidation of power in the executive. Madison and others replied that, first, the Constitution granted the executive power to the President, and control over administrative officers followed from that grant of authority. Second, they argued, the President could not be held responsible and accountable for the administration of the laws without this power. Representative John Vining of Delaware made this argument colorfully. If the Congress refused to give the President control over subordinate officers through removal: "What kind of a monster this will be, I do not pretend to say; whether it will have two heads, three heads, or four heads….But I will be

[14] THE FEDERALIST, NO. 77 (Alexander Hamilton) (George W. Carey & James McClellan ed., 2001), at 396.

bold to say it is a monster of a peculiar enormity; for gentlemen are putting the heads where the tails should be, or rather making it without any head at all."[15]

Still, the vote was very close in the First Congress. Eventually the decision to acknowledge the President's removal power passed as the result of clever political maneuvering by Representative Egbert Benson, who drafted clever amendments to split the coalition that opposed acknowledging the President's constitutional removal power. In the Senate, the vote was tied, and Vice President John Adams voted to break the tie in favor of the President.

A decision reached after contested debate and a close debate might not seem to be enough to serve as a decisive construction of the Constitution, but the Decision of 1789 was treated as such by both supporters and opponents of the outcome. William Smith, who was perhaps the most vigorous opponent of the President's constitutional removal power, wrote in 1797: "If you look into the Debates of Congress you will find this subject fully handled; I was on that occasion on the wrong & Madison on the right side."[16] In the end, all parties agreed that the Decision of 1789 settled the matter: the President had the constitutional power to remove administrative subordinates, reinforcing his responsibility for ensuring that the laws are faithfully executed.

Presidential control over administration was reinforced not only by the Decision of 1789 but also by Congress's interpretation of the Constitution's Appointments Clause. The Constitution anticipated three categories of administrative officers. The first category, comprising the highest officers in the administration, would be nominated by the President and confirmed by the Senate. The second, "inferior officers," could be nominated by the President, the heads of departments, or the courts of law, at the discretion of Congress. A final category, implied in the Constitution, would consist of non-officers, or "employees," who held positions in the government that did not rise to the level of "officer." This latter category could be appointed in any manner the legislature might select, being outside the coverage of the Appointments Clause.

The First Congress limited the scope of the last category, thus ensuring that officers would be appointed through the most accountable mechanisms possible. It interpreted "any governmental official with responsibility for an ongoing governmental duty" to be an officer covered by the Constitution's Appointments Clause.[17] Early presidents such as George Washington proceeded under the theory that all administrative officers were subject to their direction and control. As Leonard White, the great historian of American administration writes, during the Washington administration: "No department head, not even Hamilton, settled any matter of importance without consulting the President and securing his

[15] 1 *Annals of Cong.* 531 (Joseph Gales, ed. 1790).
[16] *Cited in* LEONARD WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 1789-1801 (1965), at 21 n.20.
[17] *See* Jennifer Mascott, *Who Are "Officers of the United States"?* 70 STAN. L. REV. 443 (2018). Mascott observes that if this original understanding of the scope of the Appointments Clause were followed today, thousands of officers who are not currently appointed as Article II officers would need to be appointed through one of the three methods outlined in the Inferior Officers Clause of the Constitution.

approval."[18] Although there was some variation in the practice, particularly during the presidency of James Monroe, on the whole the President's control over the administration of the law was preserved. This led Thomas Jefferson to write to a Greek colleague in 1823 that:

> We have, I think, fallen on the happiest of all modes of constituting the executive, that of easing and aiding our President, by permitting him to choose Secretaries of State, of finance, of war, and of the navy, with whom he may advise, either separately or all together, and remedy their divisions by adopting or controling [*sic*] their opinions at his discretion; this saves the nation from the evils of a divided will, and secures to it a steady march in the systematic course which the president may have adopted for that of his administration.[19]

Unitary presidential control over administration was acceptable to the Founding generation in large part because the Congress refrained from delegating legislative power to the executive. By keeping the power to make binding law in their own hands, the people's representatives in Congress made it safer to grant authority to the chief executive over all subordinate officers.

National Administrative Law: Nondelegation

Delegation of legislative power to administrative agencies is the hallmark of the modern administrative state. It is also contrary to the way American government operated during the early years of the republic.

In many important debates during the early republic, members of Congress insisted upon the importance of the nondelegation principle.[20] Congress clung to its power over tariffs, legislating in great detail on matters from the definition of goods to the amount of tariff that would be levied.[21] It also legislated the specific route of the post roads, in response to concerns over delegating too much discretion to the President to designate the route. Members objected even to the practice of referring matters to executive officers for reports, especially over referring matters of public finance to Secretary of the Treasury Alexander Hamilton. When Congress contemplated granting the President the power to suspend an embargo in the event that Britain ceased violating the United States' neutral commerce, members raised constitutional concerns that prompted Congress to rewrite the statutory provisions.

Some statutes passed in the first years of American history may suggest that Congress delegated legislative power from the very beginning. But upon closer inspection it becomes clear that these statutes in fact delegated only limited powers, not legislative in nature, to administrative bodies.

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[18] WHITE, *supra* note 16, at 27.
[19] Letter from Thomas Jefferson to Adamantios Korais (Oct. 31, 1823), in WRITINGS OF THOMAS JEFFERSON (1854), 7:321.
[20] These instances are described in further detail in Postell & Moreno, *supra* note 13, at 44-48.
[21] Louis L. Jaffe writes simply, "Congress for many years wrote every detail of the tariff laws." Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359 (1947), at 361.

For instance, the First Congress enacted a statute that continued the pension program for Revolutionary War Veterans and their families, "under such regulations as the President of the United States may direct."[22] While such a provision appears to grant a broad power to the executive to enact regulations, in practice the provision was understood to authorize purely executive decisions such as procedures for determining eligibility and the frequency of pension payments. Alongside these statutes which appear only at first glance to delegate lawmaking power (but on closer inspection do not do so), it is important to note the overwhelming evidence of congressional respect for the principle of nondelegation.

In short, the early congresses did grant some discretion to administrative officers, even including the power to make regulations. But these powers were limited to executive functions, rather than grants of legislative power.[23] More controversial, however, is Congress's enactment of the Steamboat Safety Act of 1852. In his history of American administrative law, Jerry Mashaw argues that the Act "combined something of the 'New Deal' independent regulatory commission with 'Great Society' health and safety regulation by delegating administrative authority to a multimember board that combined licensing, rulemaking, and adjudicatory functions."[24] If this claim were accurate, then the modern administrative state originated prior to the Civil War, and its compatibility to the Framers' constitutionalism may be easier to establish.

However, a careful examination of the arguments surrounding the Steamboat Act, and the actual powers granted to administrators through the Act, indicates that it granted none of the powers that are typical of the modern administrative state. The Steamboat Act was, in fact, a statute with clear standards, delegating very little discretion and no lawmaking power to administrative officers. It specified in extraordinary detail matters such as how many lifeboats must be on steamships, the material from which they should be made, the diameter of chambers in steamship pumps, and the number of axes and buckets that should be on board. It empowered inspectors to ensure that boilers were safe, since boiler explosions were the chief reasons for the bill's enactment. But the statute outlined the way in which boilers should be tested in detail, requiring inspectors to "subject[] them to a hydrostatic pressure," and delineating the pressure limits that different types of boilers could reach during the tests.

Only two other regulatory powers were given to the inspectors: first, the power to make "rules and regulations for their own conduct," likely relating to the schedules for inspections and the like, and second, the power to make rules "to be observed by all such vessels in passing each other." This power to make rules governing passing ships emerged out of confusion during the congressional debates over which ship was the "ascending" or "descending" ship in various tide waters. Since these definitions changed in different contexts, depending on whether the tide and the current ran in the same direction, it was impossible to codify the

[22] Act of Sept. 29, 1789, ch. 24, § 1, 1 *Stat*. 95.
[23] The following discussion is based on a more extended treatment of the Steamboat Act in JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 96-102 (2017).
[24] MASHAW, *supra* note 2, at 187.

specific practices ships must observe. This gave rise to the very limited power to promulgate traffic regulations in the bill.

In short, even the measure that is alleged to be the broadest delegation of legislative power prior to the Civil War, and thus a precursor to the administrative state that exists in America today, actually constrained and limited administrative power by legislating on safety standards in detail. If this measure was the outer limit of congressional delegation of power prior to the Civil War, then it can easily be concluded that Congress failed to delegate legislative power during the first several decades of American history.

As a result of the specificity of statutes, administrators had little discretion to make the law. Instead, they carried out relatively specific statutory mandates. One consequence of this was the pervasiveness of judicial review of administrative action.

A Century of Deference?

Some scholars continue to assert that judges in the early Republic routinely yielded or deferred to the policymaking decisions and rationale for those decisions by executive officers when they carried out their responsibilities. Focusing especially on federal judicial review, and on specific forms of review, such as review through writs of mandamus, they conclude that a rule of deference prevailed during the nineteenth century. For instance, Jerry Mashaw writes: "Unlike today's ubiquitous statutory provisions for judicial review of administrative action, there were very few such provisions in the early Republic. Direct review through mandamus, injunction, or appeal was extremely limited."[25] As Ann Woolhandler summarizes, "To the extent writers generalize among the different subject-matter areas, the whole first hundred years is lumped together as an age of judicial deference to the agencies."[26]

This assessment of the nineteenth century as an era of judicial deference to administrators is inaccurate because it is oversimplistic and incomplete. By focusing narrowly on only federal cases, and only in the context of certain forms of judicial review, this assessment concludes that because deference existed in some contexts, it was a general rule of judicial review. In the mandamus context, where the court orders an official to carry out an action that is required by law, where there is no discretion lodged in the official, courts were understandably reluctant to find that a law foreclosed all executive discretion, and thus they tended to defer to the executive.

Yet in many other areas, judges reviewed the substantive reasonableness of administrative regulations and actions, often essentially *de novo* or without regard to policy judgments by administrative officials. At the federal level, officers were subject to a variety of state common law actions by private citizens. Those legal actions subjected federal officers to personal liability for harming citizens through illegal exercises of power. Treasury officials during the Washington administration frequently wrote to Treasury Secretary Alexander

[25] MASHAW, *supra* note 2, at 18.
[26] Ann Woolhandler, *Judicial Deference to Administrative Action – a Revisionist History*, 43 ADMIN L. REV. 197 (1991), at 198.

Hamilton, asking for clear guidance on their legal responsibilities in order to avoid violating the law and suffering personally for doing so. In many cases the national government relied on judicial administration of the law in the first place, rather than committing administration to executive officers with judicial review. For instance, regulations of merchants, employment in cod fisheries, and other matters were enforced by judges imposing statutory sanctions in courts of law. Many statutes authorized "informers" to serve as private enforcers of the law, and they were authorized to collect portions of the penalties for legal violations.

At the state level, where the police power was exercised and where most regulation was enacted, judges could evaluate the purposes of a regulation to ensure that it was within the proper scope of police power authority. In one illustrative case, *Austin v. Murray* (1834), the Massachusetts Supreme Judicial Court overturned a burial regulation that prevented the undertaker of the Catholic Church from bringing dead bodies into the city of Charlestown. Justice Samuel Wilde wrote: "A by-law to be valid, must be reasonable." This bylaw, however, was not "made in good faith for the purpose of preserving the health of the inhabitants" of the town."[27] Therefore, on substantive grounds, the court overturned the regulation. *Austin v. Murray* was not an anomaly, and was widely cited in law treatises as evidence for a judicially-enforced reasonableness requirement for police power regulation.[28]

While there were some pockets of judicial deference to the executive in antebellum America, in many other contexts judicial review was robust. Courts were not relegated to the sidelines in nineteenth-century administration. They played a vital role, in some cases serving as the administrators themselves, and in others serving as an important legal constraint on administrative power. As Aditya Bamzai has recently explained, "no general rule of statutory interpretation requiring 'deference' to executive interpretation *qua* executive interpretation" existed in the nineteenth century.[29]

Conclusion

Early American administrative law relied upon a foundation of constitutional principles that ensured administrative accountability to the people, limited the discretion of administrative officers through nondelegation and accountability to the law, and (at the national level) giving the president responsibility for the execution of law. There was plenty of regulation in early America, but there was no administrative state in the modern sense of the term, because American constitutionalism was understood to prevent its emergence.

Examples of regulation in early America reflect those constitutional principles and reveal an alternative to the administrative state. This alternative path to administration seeks to limit

[27] *Austin v. Murray*, 33 Mass. (16 Pick.) 121, at 125, 127 (Mass. 1834).
[28] For instance, Thomas M. Cooley cited *Austin v. Murray* and a handful of other cases for the proposition that "Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 200 (Little, Brown & Co. 1868).
[29] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 965 (2017).

discretionary power and arbitrariness by promoting accountability through frequent elections of local administrative officers. More importantly and relevant for purposes of this paper, the alternative approach also seeks to check and limit state and national administrative powers through law. Power should be carefully limited by legislatures writing specific statutes that avoid delegating their power to administrative officers. And judicial review should involve more exacting scrutiny of legislative and administrative actions to ensure that officers exercise their authority according to the law.

As Alexis de Tocqueville observed during the antebellum period, American administrative law used constitutional principle to ensure that "authority is great and the official small, so that society would continue to be well regulated and remain free."[30] A careful study of early American administrative law is thus important for considering the possibility of establishing a robust modern framework for regulation without limiting freedom.

* Joseph Postell is an Associate Professor of Political Science at the University of Colorado-Colorado Springs and a member of the Free State Foundation's Board of Academic Advisors. During the 2017-18 academic year Professor Postell was a Visiting Fellow in American Political Thought at The Heritage Foundation.

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[30] TOCQUEVILLE, *supra* note 8, at 67.