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The Conservative Counterrevolution in Administrative Law

by

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Introduction and Summary

Beginning in the 1980s, a conservative counterrevolution in administrative law emerged that seemed to accept the administrative state's constitutional legitimacy while, at the same time, it sought to minimize judicial intervention in administrative matters. This approach to administrative law embodying judicial restraint is best understood in view of its curious connections to the two regimes of administrative law that preceded it, one that existed from the New Deal to the 1960s, and one that emerged during the 1960s and 1970s. The administrative law doctrines of the conservative counterrevolution also merit close consideration because we appear to be witnessing the early stages of its eclipse by Supreme Court decisions that increasingly reflect skepticism of the administrative state's powers.

The original Progressive-Era architects of the administrative state aimed to enshrine neutral and apolitical expertise as the basis for the administrative state.[1] Consequently, they emphasized the need for deferential judicial review of administrative agencies.

[1] See Joseph Postell, "A Tale of Two Administrative Law Regimes," *Perspectives from FSF Scholars*, Vol. 15, No. 16 (April 7, 2020), at: https://freestatefoundation.org/wp-content/uploads/2020/04/A-Tale-of-Two-Administrative-Law-Regimes-040720.pdf (accessed 12/1/20).

Later progressives rejected this model of neutral expertise, emphasizing the administrative process as a "surrogate political process" rather than a scientific one.[2] In the 1960s and 1970s, they modified administrative law doctrines across a variety of issues, from the review of agency procedures to the review of agency statutory interpretation to the standing to sue administrative agencies. All of these doctrines pointed towards greater judicial involvement in the administrative process.

Administrative law thus followed the historical trajectory of constitutional law, in which progressives of the early 20th Century focused on limiting judicial review, in contrast to the more active judiciary envisioned by later 20th Century progressives.

Beginning in the late 1960s and 1970s, however, Republicans' increasing success in winning presidential elections led to the formation of a more conservative judiciary. Yet instead of aiming to restore the 19th Century approach to administrative law, conservative judges looked to the early 20th Century administrative law regime of judicial deference as the solution to the judicial overreach of the 1960s and 1970s. In a curious reversal of institutional allegiances, conservatives defended administrative agencies from judicial encroachment by modifying legal doctrines to enshrine judicial restraint.[3]

The apparent consensus among conservative-leaning judges such as Chief Justice William Rehnquist and the late Justice Antonin Scalia was similar to earlier progressives such as Woodrow Wilson, Herbert Croly, and James Landis. Conservative judges seemed willing to acquiesce to the legal legitimacy of the administrative state as long as they could constrain the courts' ability to influence its decisions.

The conservative counterrevolution in administrative law spanned four different areas of legal doctrine – access to judicial review of agency action, judicial review of agency procedures, judicial review of agency policymaking, and judicial review of agency statutory interpretation. In each one of these areas, conservative judges attempted to return administrative law to the more deferential approach that prevailed in the first half of the 20th Century. However, in each one, success in constraining judicial intervention in agency processes and substantive decisions was limited.

Moreover, in the last decade, conservatives' apparent acceptance of the legitimacy of the administrative state has fallen apart. A new approach is emerging among conservative-leaning judges that is more skeptical of the administrative state's legitimacy and more aggressive about checking the administrative state's power. For instance, there are indications that a majority on the Court favors reviving the nondelegation doctrine in some form. This doctrine, rooted in the first sentence of Article I of the U.S. Constitution, requires Congress to exercise all legislative power and prevents it from transferring that vested authority to other officials.[4] Conservative judges have also sought to limit the scope of agency discretion by expanding the scope of judicial review of agency action. Both the *Chevron* doctrine of deference to

[2] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975), at 1670.
[3] This is one of the central arguments in Joseph Postell, BUREAUCRACY IN AMERICA (2017), especially at 319-20.
[4] U.S. Const. Art. I, sec. 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

administrative statutory interpretation and the *Auer* doctrine of judicial deference to administrative constructions of agency rules have been limited by recent cases.

To date, this new approach has not significantly weakened the administrative state, but it has reopened debate about the constitutional legitimacy of the administrative state. That debate, which may well lead to significant changes in the structure and scope of the administrative state, ought to be informed by the history of administration that has been the subject of this series.

The Counter-Reformation of Administrative Law

As described in the previous essay in this series, a new administrative law regime emerged in the 1960s and 1970s that adjusted legal doctrines to heighten judicial supervision of the activities of the administrative state.[5] In a classic article, Richard Stewart called the changes to administrative law in the 1960s and 1970s "The Reformation of American Administrative Law."[6] The conservative reaction to that reformation, beginning in the 1980s, was a limited counter-reformation. Behind this counter-reformation in administrative law was an implicit willingness to acquiesce in the administrative state and relinquish or downplay constitutional objections so long as liberal courts were kept out of a presidentially directed bureaucracy.

The counter-reformation of administrative law thus avoided revisiting questions concerning delegation of legislative power to agencies and the insulation of administrative power from presidential control. Instead, conservative judges attempted to return administrative law to the more deferential approach that prevailed in the first half of the 20th Century. In four different areas of law – access to judicial review of agency action, judicial review of agency procedures, judicial review of agency policymaking, and judicial review of agency statutory interpretation – conservative judges articulated a jurisprudence that emphasized deference to agency decisions and processes. However, their success in each of these areas was limited.

Attacking "Enforcement by Private Interests"

One of the critical developments in administrative law during the 1960s and 1970s was the expansion of the range of parties and interests that had standing to sue administrative agencies to challenge their decisions. In a series of cases, courts redefined the element of "injury" in standing inquiries to include ideological, aesthetic, and similar interests, so that demonstrating an injury to those interests would be adequate to trigger judicial review. This shift in administrative law reestablished enforcement by private parties and interests, resembling the extensive reliance on "qui tam" actions by private citizens for administrative enforcement in the 19th Century.[7]

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[5] See Postell, *supra* note 1.
[6] Stewart, *supra* note 2.
[7] See Joseph Postell, "Reconciling Administration and Constitutionalism in Early America," *Perspectives from FSF Scholars*, Vol. 14, no. 2 (January 14, 2019), at: https://freestatefoundation.org//wp-content/uploads/2019/09/Reconciling-Administration-and-Constitutionalism-in-Early-America-011419.pdf (accessed 12/1/20), especially at 11-12. See also Postell, BUREAUCRACY IN AMERICA, *supra* note 3, especially at 69-71, 89-93.

In a significant decision in 1992, *Lujan v. Defenders of Wildlife*,[8] Justice Scalia, writing for a majority on the Supreme Court, attempted to establish a new framework that would restrict the range of interests that could challenge administrative decisions. The *Lujan* framework specified the decision being challenged "must affect the plaintiff in a personal and individual way" to satisfy the injury requirement for legal standing to sue.[9] The Court relied on this rationale to deny standing to plaintiffs' who alleged that they may return to areas purportedly affected by the Interior Department's decision applying the Endangered Species Act only to areas within the U.S. or the high seas.

Lujan appeared to signal a counterrevolution against the expansive standing regime that the judiciary had constructed in the previous few decades. However, the reach of this counterrevolution was narrowed by subsequent decisions.

For instance, in 2000, the Court decided *Friends of the Earth v. Laidlaw Environmental Services*.[10] The case concerned discharges by Laidlaw into the North Tyger River in South Carolina that exceeded the limits specified in its permit granted pursuant to the Clean Water Act. Testing of the river revealed that the environment was not actually harmed by Laidlaw's excessive discharges. Nevertheless, Friends of the Earth sued to enforce the law against Laidlaw. The Court agreed that Friends of the Earth had standing to sue because of the potential psychological damage done to some of its members in knowing that the discharge limits had been exceeded.

Dissenting in the case, Justice Scalia complained that the ruling established "a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests."[11] Thus, as Scalia himself acknowledged, in spite of his efforts the Court did not put an end to the expansion of standing and the use of public interest groups to constrain administrative decision making.

The Battle Over Hybrid Rulemaking

Just as courts had expanded standing to sue agencies in the 1960s and 1970s, they also expanded the procedural requirements for administrative rulemaking pursuant to the Administrative Procedure Act (APA). In addition to the APA's minimum requirements of a basic notice of proposed rulemaking, opportunity for public comment, and concise statement of a rule's basis and purpose upon promulgation, the new administrative law doctrines required agencies to include extensive discussions and data in their notices, to add procedures such as hearings during the rulemaking, and to respond to meaningful comments in their statements of basis and purpose. These judicial enhancements to the APA informal rulemaking process became known as "hybrid rulemaking."

The Supreme Court unequivocally rejected the judicial imposition of these expanded procedures in the 1978 case of *Vermont Yankee Nuclear Power Corporation v. Natural*

[8] 504 U.S. 555 (1992).
[9] *Id*., at 560.
[10] 528 U.S. 167 (2000).
[11] *Id.*, at 209 (Scalia, J., dissenting).

Resources Defense Council.[12] Writing for the Court in a unanimous decision, then-Justice Rehnquist used striking language to suggest that the D.C. Circuit Court of Appeals had mistakenly assumed the authority to impose procedural requirements on administrative agencies. Rehnquist remarked that "we find absolutely nothing in the relevant statutes to justify what the [lower] court did" in the case.[13] "To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement," he continued.[14] "The fundamental policy questions appropriately resolved in Congress and in the state legislatures," Rehnquist lectured the D.C. Circuit, "are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action."[15]

Vermont Yankee suggested that federal courts would have to cease imposing procedural requirements on agencies that are not clearly mandated by statute. However, the D.C. Circuit was undeterred, and it continues to impose onerous procedural requirements at the notice and final stages of the rulemaking process.[16] Thus, the *Vermont Yankee* decision did not fundamentally shift administrative law doctrines governing agency procedures to a more deferential posture.

A Hard Look or a Cursory Glance?

Judicial review of the substance of agencies' decisions, like judicial review of agency procedures, underwent significant expansion in the administrative law revolution of the 1960s and 1970s. One of the chief areas of expansion was in the requirement that agencies engage in "reasoned decision-making," a mandate that is typically connected to section 706 of the APA which requires courts to set aside decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] In the 1960s and 1970s, courts expanded this requirement to force agencies to explain their reasoning to show that it had taken a "hard look" at a question and "engaged in reasoned decision-making" before acting."[18]

The Supreme Court endorsed this administrative law doctrine in the 1983 case *Motor Vehicle Manufacturers Association v. State Farm*.[19] It reversed the Department of Transportation's decision to rescind a rule requiring passive restraints to be installed in new motor vehicles. The Court determined that the Department could not rescind the rule without citing scientific evidence as the basis for its decision. Agencies would have to offer evidence-based explanations that demonstrated they are using their expertise to advance their statutory mission.

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[12] 435 U.S. 519 (1978).
[13] *Id.*, at 557.
[14] *Id.*, at 557.
[15] *Id.*, at 558 (emphasis original).
[16] See, e.g., *Connecticut Light and Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525 (D.C. Cir. 1982); *American Radio Relay League v. Federal Communications Commission*, 524 F. 3d 227 (D.C. Cir. 2008); *Louisiana Land Bank Association v. Farm Credit Administration*, 336 F.3d 1075 (D.C. Cir. 2003).
[17] 5 U.S.C. §706(2)(A).
[18] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (1970), at 851.
[19] 463 U.S. 29 (1983).

Justice Rehnquist wrote separately in opposition to the hard look doctrine. As he argued, "The agency's changed view of the [passive restraint] standard seems to be related to the election of a new president of a different political party….A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress," it should be able to adjust its rules because of political pressure and elections.[20]

The conservative counterrevolution never succeeded in gaining a majority of Supreme Court justices in a major "hard look" case the way it did in standing and hybrid rulemaking cases. Whereas *Lujan* and *Vermont Yankee* at least signaled some retreat from the expansive judicial review regime of the 1960s and 1970s, the courts have never really questioned the imposition of "hard look" review as part of its administrative law framework.

The Rise and Fall of the Chevron Doctrine

The most significant area of substantive review in administrative law is related to its most famous doctrine: the "*Chevron* doctrine." Ironically, that doctrine is named after a case – *Chevron v. Natural Resources Defense Council*[21] – that was not intended to produce it.[22] At issue in *Chevron* was a question of statutory interpretation: what was a "stationary source" under the terms of the Clean Air Act?

In reviewing an EPA decision to treat an entire facility as a single stationary source rather than each source of emissions within a facility, Justice Stevens articulated the now-famous "Chevron Two-Step." In brief, that two-step inquiry asks, first, whether the statute is clear. If so, then the court must give effect to the statute. However, if the statute is ambiguous, a reviewing court proceeds to the second step, and asks whether the agency offered a reasonable construction of the statute. And if so, the court must give effect to the agency's construction.

In subsequent decisions, Justice Scalia advocated a strong reading of the *Chevron* decision that would require courts to defer to any reasonable agency interpretation of a statute. This would dramatically reduce judicial intervention in the administrative state because many agency decisions are based upon ambiguous statutory requirements that could be interpreted differently to produce dramatically different outcomes. In other words, the strong reading of *Chevron* would shift control of the administrative state from the judiciary back to the bureaucracy.

Although the *Chevron* doctrine is often understood to be a major shift in administrative law, and one that weakened judicial review of agency decisions, its impact has been narrowed by subsequent cases. In the first place, the Court has determined that many decisions are exempt from the *Chevron* framework. These cases, sometimes called "Step Zero" cases, conclude that *Chevron* does not apply and a weaker standard of deference should be followed.[23] In addition,

[20] *Id.*, at 59 (Rehnquist, J., concurring in part and dissenting in part).
[21] 467 U.S. 837 (1984).
[22] See Gary Lawson and Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013).
[23] For the most prominent case in this line, see *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

courts can apply the *Chevron* test but find that the statute is clear at "Step One" and impose its own construction of the statute rather than defer to the agency's.[24] Sometimes, for reasons that are not entirely clear, the Supreme Court will ignore the *Chevron* framework entirely and construe a statute *de novo*.[25] Thus, even in this most high-profile area of administrative law involving the *Chevron* doctrine, the conservative counterrevolution has only met with limited success.

When examining the entirety of this counterrevolution across all four areas of law examined above, it is clear that the administrative law regime of the 1960s and 1970s, with its emphasis on extensive judicial review, is still largely in place.

Détente With the Administrative State vs. the Emerging "Anti-Administrativism"

The deferential model of administrative law conservatives sought to reintroduce was premised largely on the exercise of judicial restraint. It resembled the early progressives' vision for administrative law, a vision which came to fruition from the New Deal to the 1960s, rather than the constitutional approach to administration that prevailed during the 19th Century.[26] These judges – particularly Justices Rehnquist and Scalia – signaled a willingness to accept the administrative state's constitutional legitimacy but to place it under the control of the presidency rather than courts and interest groups.

However, in the past decade judges that embrace an originalist approach to understanding separation of powers principles and the respective roles of the coordinate branches of government have become more open to questioning the constitutional legitimacy of the administrative state. As one recent article in the *Harvard Law Review* argues, the administrative state is now "under siege" by "contemporary anti-administrativism."[27] The re-emergence of conservative distrust of the administrative state on constitutional grounds is a relatively recent development and has not yet led to any significant weakening of the power of the administrative state. Yet there are signals that criticism of the administrative state based on constitutional first principles may lead to some significant doctrinal changes in the near future.

Since the inauguration of President Barack Obama in 2009, conservatives on the Supreme Court have become more openly critical of the constitutional foundations of the administrative state. This criticism has found expression across a spectrum of doctrinal issues. Three justices favored striking down a federal statute in *Gundy v. United States* based on the nondelegation doctrine,[28] and there are indications that a majority on the Court now favors

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[24] See, for instance, *MCI Communications Corp. v. AT&T*, 512 U.S. 218 (1994).
[25] For examples, see *Massachusetts v. EPA*, 549 U.S. 497 (2007); *King v. Burwell*, 576 U.S. 988 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). These cases will often refer to *Chevron* but will conclude that *Chevron* does not apply for various reasons. Therefore, they are sometimes categorized as "Step Zero" cases. Scholars are divided on how to understand these cases. My only contention is that in these cases, usually involving major policy choices, the Court will find ways to avoid deferring to the agency under *Chevron*.
[26] On the 19th Century model of administrative law, see Postell, "Reconciling Administration and Constitutionalism in Early America," *supra* note 7.
[27] Gillian Metzger, *Foreword – 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017), at 4.
[28] *Gundy v. United States*, 588 U.S. __ (2019).

reviving the nondelegation doctrine in some form.[29] This doctrine, rooted in the first sentence of Article I of the U.S. Constitution, requires all legislative power to be exercised by the elected Congress rather than unelected executive or administrative officers. Congress, therefore, may not transfer its vested legislative authority to other officials.

The Court invalidated the extensive enforcement powers of administrative law judges who were appointed outside of the constitutionally-specified methods for principal and inferior officers.[30] The Court also invalidated a portion of the structure of the Consumer Financial Protection Bureau, which created a single director over the agency who could only be removed by the President for cause.[31] In doing so, the Court claimed that Congress violates the separation of powers when it creates an agency headed by a single individual who is only removable for cause. It sought to confine the limits to the President's removal power to only those cases covered under long-standing precedents. In short, constitutional criticism of the administrative state has been evident in decisions in the past few years limiting, or promising to limit in the near future, both the extent of agency powers and the degree to which agencies can be structurally insulated from accountability to the elected President.

Beyond the constitutional challenges, conservative judges have also sought to limit the scope of agency discretion by expanding the scope of judicial review of agency action. Both the *Chevron* doctrine of deference to administrative statutory interpretation and the *Auer* doctrine of judicial deference to administrative constructions of agency rules have been limited by recent cases.[32] While Justice Elena Kagan, who is not considered a judicial conservative, was the author of a few of these opinions, conservatives on the Supreme Court often supplied the votes needed to produce the majority and wrote concurring opinions that went even farther than the majority opinion in subjecting agency discretion to judicial review.[33]

Justice Neil Gorsuch's confirmation to fill the vacancy left by the death of Justice Antonin Scalia is emblematic of the change that has taken place. Justice Scalia was the chief exponent of the *Chevron* deference regime, and Justice Gorsuch has emerged as its most outspoken critic. While both are considered to be judicial conservatives, their views on administrative law vary in important respects.

Conclusion

The battle over the legitimacy of the administrative state seemed to be over by the end of the 20th Century. The new dynamic would pit judicial conservatives seeking to expand judicial deference to administrative agencies against judicial progressives wanting to expand judicial

[29] This fact is noted widely, but for two examples, see Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. Journal of Law and Liberty 280 (2019); Joseph Postell, *Can the Supreme Court Learn from the State Nondelegation Doctrines?* (forthcoming; on file with author).
[30] *Lucia v. Securities and Exchange Commission*, 585 U.S. __ (2018).
[31] *Seila Law v. Consumer Financial Protection Bureau*, 591 U.S. __ (2020).
[32] On *Chevron*, see *King v. Burwell*, *supra* note 25, which created a new exception to *Chevron* deference, and *Michigan v. EPA*, 576 U.S. 743 (2015), in which the EPA lost a case in spite of the application of the *Chevron* doctrine. On *Auer*, see *Kisor v. Wilkie*, 588 U.S. ___ (2019).
[33] Although the decision in *Kisor* was unanimous, this was especially true in *Lucia*, wherein Sotomayor wrote a dissenting opinion, joined by Justice Ginsburg. In *Kisor*, Kagan's opinion merely limited the scope of *Auer* deference, while the concurring opinions written by the Court's conservatives advocated eliminating *Auer* deference altogether.

review to supervise potentially captured agencies. Paradoxically, the modern conservatives resembled the earlier progressives in their advocacy for judicial restraint. But the doctrines of judicial deference relied on by conservative judges achieved only modest success in limiting judicial intervention in legal challenges involving administrative processes and substantive decisions.

In the last decade, moreover, this apparent consensus in accepting the legitimacy of the administrative state and according it deference has been shattered. The foundations of the modern administrative state are now more openly questioned by justices on the Supreme Court, with potentially significant consequences for the structure and scope of the administrative state.

These battles are not likely to subside anytime soon. We are in the midst of a potentially transformative shift in administrative law. That presents both danger and opportunity. Modern government, and the instruments of the modern administrative state, perform important functions upon which Americans have come to rely. Yet the constitutional foundations of that modern state have never been fully established. As thoughtful originalists formulate their response to the challenge of the modern administrative state, it is critical that they understand the history of the administrative state and the depth of the challenge it poses to constitutional government. It is this author's hope that *Bureaucracy in America* will assist in that necessary task.

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Publications in this Series on Constitutionalizing the Administrative State

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Joseph Postell, "Reconciling Administration and Constitutionalism in Early America," *Perspectives from FSF Scholars*, Vol. 14, No. 2 (January 14, 2019).

Joseph Postell, "Progressivism and the Beginnings of the True Administrative State," *Perspectives from FSF Scholars*, Vol. 14, No. 21 (September 11, 2019).

Joseph Postell, "A Tale of Two Administrative Law Regimes," *Perspectives from FSF Scholars*, Vol. 15, No. 16 (April 7, 2020).