

**AMERICA'S ADMINISTRATIVE STATE:  
TRACKING THE ORIGINS AND CONSEQUENCES  
OF JUDICIAL DEFERENCE TO FEDERAL AGENCIES**

By

Richard O. Faulk  
Alexander Dubose Jefferson & Townsend, LLP

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## ABOUT THE AUTHOR

**Richard O. Faulk** is a Partner with Alexander Dubose Jefferson & Townsend LLP, an appellate boutique law firm with offices in Houston, Austin and Dallas, Texas. He divides his time between Texas and Washington, DC, enhancing the national reach of the firm's appellate practice in class actions, multi-district litigation (MDL), and individual lawsuits.

Mr. Faulk was one of the first lawyers board certified in civil appellate law by the Texas Board of Legal Specialization in 1987. His focus on complex tort and environmental litigation—including class actions and mass tort cases—has led him to brief and argue cases before the United States Supreme Court and a number of federal and state appellate courts throughout the country.

In Washington, DC, Mr. Faulk served as the Senior Director of Energy and Environment for the Law & Economics Center of George Mason University School of Law, where he participated in judicial, state attorneys general, and congressional staff education conferences. He has testified regarding environmental issues before congressional committees and remains a member of the Board of Overseers for the Searle Civil Justice Institute.

Mr. Faulk has authored and published over forty scholarly articles for numerous law reviews, the Washington Legal Foundation, the Bureau of National Affairs, Westlaw Publications and the Institute for Energy Law in Texas. In 2015, he won his fourth William Burton Award for Legal Writing at ceremonies at the Library of Congress for an article on Clean Air Act preemption of public-nuisance lawsuits he co-authored for WLF. He also authored the Chapter on “Writing Appellate Briefs” in the treatise *APPELLATE PRACTICE IN FEDERAL AND STATE COURTS* (D. Axelrad, ed. 2016).

Mr. Faulk is licensed to practice in Texas and the District of Columbia. He is admitted to practice in the United States Supreme Court, the Circuit Courts of Appeals for the Fifth, Ninth, and DC Circuits, and the federal district courts of the Northern, Eastern and Southern Districts of Texas.

**The views and opinions expressed in this article are those of the author and do necessarily represent or reflect the views of Alexander Dubose Jefferson & Townsend LLP.**

# **AMERICA’S ADMINISTRATIVE STATE: TRACKING THE ORIGINS AND CONSEQUENCES OF JUDICIAL DEFERENCE TO FEDERAL AGENCIES**

## **INTRODUCTION**

Legal scholars, regulated parties, and several members of the United States Supreme Court have viewed the expanding scope of federal regulatory authority, often referred to as the “Administrative State,” with deep concern. Our nation’s founders distrusted such concentrated power—and wisely devised a Constitution that separated government power among three co-equal branches to preclude dangerous arrogations by any of them.

Unfortunately, Congress’s excessive delegation of legislative authority combined with deferential judicial review of regulatory excursions have empowered the Executive Branch far beyond the founders’ intentions. Continued allegiance to such practices will further dilute the democratic guarantees and political accountability necessary for truly representative government.

This WORKING PAPER explains the origins of the Administrative State, beginning with the Supreme Court’s abandonment of the non-delegation doctrine. It then documents the evolution of judicial deference to administrative interpretations of statutes, highlighting the three most frequently used types, and outlines the troubling consequences of that deference.

### **I. THE FOUNDERS’ DISTRUST OF INADEQUATELY RESTRAINED EXECUTIVE POWER**

In a prescient, indeed almost prophetic, statement, Alexander Hamilton wrote that “plurality in the executive ... tends to conceal faults and destroy responsibility.”<sup>1</sup> Although

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<sup>1</sup> THE FEDERALIST NO. 70 at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Hamilton was referring to the need for a single Chief Executive, his warning applies equally when Congress delegates and diffuses its lawmaking authority to myriad administrative agencies within the Executive Branch. Under such circumstances, the legislative power not only passes from Congress—the body to whom the people have constitutionally entrusted it—but also through the President to a diffuse unelected bureaucracy. This concern persists in modern times. As Justice Alito recently recognized, “a vital constitutional principle must not be forgotten: Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”<sup>2</sup>

According to Justice Joseph Story, separation of powers was essential to the preservation of liberty because in “absolute governments, the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him.”<sup>3</sup> To avoid such a dangerous concentration, “it has been deemed a maxim of vital importance, that these powers should forever be kept separate and distinct.”<sup>4</sup>

Although the Constitution provided a structural framework for the separation of powers, it did not provide specific guidance regarding how the concept would operate in practice.<sup>5</sup> Instead, it established separation as a fundamental default principle subject to positively enumerated exceptions necessary for checks and balances.<sup>6</sup> This dynamic and

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<sup>2</sup> *Dept. of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J. concurring).

<sup>3</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES vii (1833).

<sup>4</sup> *Ibid.*

<sup>5</sup> PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 331-32 (2014).

<sup>6</sup> *Ibid.*

interactive separation of powers doctrine avoided tyranny that would otherwise be risked by excessive concentration of authority in any single branch, entity, or person. Supplemented by amendments such as the Bill of Rights, the Constitution evolved to acknowledge even greater degrees of liberty than those specified by the founders. Unfortunately, those liberties are now at risk from an increasingly expansive and politically unaccountable Administrative State—a risk created by the judiciary’s unilateral withdrawal from its core duty of judicial review.

## **II. THE ADMINISTRATIVE STATE’S ORIGINS**

Congress gave rise to the Administrative State when it decided to delegate its constitutional legislative authority to administrative agencies within the Executive Branch—ceding its lawmaking authority to an unelected bureaucracy. The evolution continued when the judiciary ceded its constitutional authority to decide what the law is by deferring to agencies’ interpretations of laws entrusted to their administration, by deferring to agencies’ interpretations of their own regulations, and by deferring to agencies’ scientific conclusions reached in the regulatory process. This unchecked aggrandizement of executive power occurred—and continues today—despite the judiciary’s professed allegiance to the separation of powers doctrine, a fundamental structure designed to protect citizens from inadequately controlled executive authority.

As a result of this process, Congress is no longer the primary generator of American laws. Instead, a vast array of regulatory agencies now “implement” broadly delegated legislative power through administrative regulations, and substitute their expertise for the judgment of the people’s elected representatives. Although the President has supervisory authority and the ability to set the regulatory agenda of many agencies, the majority of

agency employees are civil servants—persons who persist through successive administrations and may resist decades of political winds. Moreover, since many agencies are actually independent of presidential authority, they are even more insulated from executive influence and supervision.<sup>7</sup> For example, Congress has typically insulated the federal officials responsible for these agencies from “at will” removal by the President, requiring showings of “cause” to justify their discharge.<sup>8</sup>

Each year, “the growth of Statutes at Large is dwarfed by the expansion of the Federal Register.” As a result, “America is now a nation governed largely by the duly appointed administrators of the people rather than by the duly elected representatives of the people.”<sup>9</sup> It is important to understand how this dangerous situation arose—and more importantly, how its progress may be arrested and, if possible, reversed.

### **A. The Decline of the Non-Delegation Doctrine**

Originally, a non-delegation doctrine precluded legislatures from transferring their powers to other branches of government. The doctrine has strong historical roots. As early as 1690, John Locke wrote that “[t]he Legislature 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.”<sup>10</sup> Chief Justice John Marshall recognized the doctrine in 1825 when the Supreme Court held that “[i]t will not be contended that Congress can delegate ...

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<sup>7</sup> David Casazza, *Liberty Requires Accountability: Checking Delegations to Independent Agencies*, 38 HARV. J. L. & PUB. POL’Y 729, 731 (2015).

<sup>8</sup> *Id.* at 731 n.10 (providing exhaustive list of independent agencies and grounds for removing responsible officials).

<sup>9</sup> *Ibid.*

<sup>10</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 380-81 (1690).

powers which are strictly and exclusively legislative.”<sup>11</sup> Although Marshall did not provide any criteria for determining whether a power was “strictly and exclusively legislative,” he explained that any delegation of legislative authority must provide a “general provision” for “those who are to act” to “fill up the details.”<sup>12</sup>

Perhaps wisely, Marshall did not wade too deeply into the non-delegation waters. He recognized that “the maker of the law may commit something to the discretion of the other departments,” but also cautioned that “the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.”<sup>13</sup> Over a century later, the Supreme Court interpreted Marshall’s words to permit delegations of legislative authority to fill up the details as long as Congress “shall lay down by legislative act an *intelligible principle* to which the person or body authorized ... is directed to conform.”<sup>14</sup>

Unfortunately, the meaning of “intelligible principle” remains as elusive as the “general provision” rule originally used by Chief Justice Marshall. Although the Supreme Court recognized and applied the non-delegation doctrine for over a century after the Republic was founded,<sup>15</sup> the mechanics of the Court’s reasoning and the scope of its rulings are still unsettled. The doctrine was used to disapprove major components of President

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<sup>11</sup> *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.* at 46.

<sup>14</sup> *J.W. Hampton Jr. Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).

<sup>15</sup> *See, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”); *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”) (Marshall, C.J.).

Roosevelt’s New Deal,<sup>16</sup> and its vitality persisted—at least for purposes of discussing its rationale—to relatively recent times.<sup>17</sup>

As the intricacies of legislative activity increased, however, the Supreme Court loosened the reins. In *Mistretta v. United States*,<sup>18</sup> the Court decided that the press of legislative activity and responsibilities justified a more permissive interpretation:

[O]ur jurisprudence has been 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*. ... Accordingly, this Court has deemed it ‘constitutionally sufficient’ if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.<sup>19</sup>

But *Mistretta* was not a unanimous decision. In a remarkably prophetic dissent, Justice Scalia clearly foresaw that the majority’s ruling would result in a plethora of new administrative agencies:

By reason of today’s decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of “expert” bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility.<sup>20</sup>

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<sup>16</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that Bituminous Coal Conservation Act improperly delegated legislative authority to private industry); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down provision of National Recovery Act which gave broad discretion to the President to stimulate the economy by having industries create fair competition codes); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (reaching similar result regarding enforcement of limits on interstate transportation of oil).

<sup>17</sup> See *Dep’t of Transp.*, 135 S. Ct. at 1234 (Alito, J. concurring); *Indust. Union Dep’t., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J. concurring) (The non-delegation doctrine ensures “that important choices of social policy are made by the Congress, the branch of our government most responsive to the popular will.”).

<sup>18</sup> 488 U.S. 361 (1989).

<sup>19</sup> *Id.* at 372-73. (emphasis added) (internal citations omitted).

<sup>20</sup> *Id.* at 422 (Scalia, J., dissenting).

More importantly, Justice Scalia predicted that the majority's expansive decision would also create the exact "fourth branch" observed by Professor Turley:

I think the Court errs, in other words, not so much because it mistakes the degree of commingling [of power between the branches of government], *but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress.* It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. *And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.*<sup>21</sup>

The connections between Justice Scalia's dissenting remarks in *Mistretta* and the present Supreme Court's disapproval of excessively broad and overreaching regulations are too obvious to be ignored.<sup>22</sup> Nevertheless, when given the opportunity to avoid the dangers of delegation in *Whitman v. American Trucking Association, Inc.*<sup>23</sup> Justice Scalia's majority opinion surprisingly stopped short.

*Whitman* involved whether Congress could delegate legislative power to the Environmental Protection Agency (EPA) through the Clean Air Act (CAA) to set air quality standards. In the CAA, Congress ordered EPA to develop and apply criteria "to protect the public health" with an "adequate margin for safety."<sup>24</sup> After EPA issued standards pursuant to Congress' directive, a trucking association challenged the standards as violations of the non-delegation doctrine. Although the US Court of Appeals for the DC Circuit agreed that the doctrine was violated because Congress' directive "lack[ed] any determinate criterion for

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<sup>21</sup> *Id.* at 427 (Scalia, J., dissenting) (emphasis added).

<sup>22</sup> See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

<sup>23</sup> 531 U.S. 457 (2001).

<sup>24</sup> 42 U.S.C. § 7409(b)(1).

drawing lines”<sup>25</sup> and “failed to state intelligibly how much is too much,”<sup>26</sup> the majority of the Supreme Court—led by Justice Scalia—took the opposite view.

Although Justice Scalia recognized that the Constitution’s text “permits no delegation” of legislative powers,<sup>27</sup> his majority opinion nevertheless found that no unconstitutional delegation had taken place. Instead of condemning Congress for abdicating its duty to frame a clear policy agenda for EPA to “fill in,” Justice Scalia found that Congress simply delegated a “certain degree of *discretion*” which is “inher[ent] in most executive or judicial action.”<sup>28</sup> Congress was not required to specify a “determinate criterion” that provided “how much is too much.”<sup>29</sup> Instead, EPA could resolve that problem by exercising its discretion without violating Congress’ legislative prerogative—such discretion was “well within the outer limits of the Court’s non-delegation precedents.”<sup>30</sup> As a result, the *Whitman* Court bypassed a prime opportunity to constrain the growth of the Administrative State—and contributed to its growing danger that, according to Chief Justice Roberts, “cannot be dismissed.”<sup>31</sup>

Indeed, the process of determining whether a statute operates as an improper delegation of legislative authority—instead of an acceptable grant of discretion—has been reduced to a set of unanswered questions. For example, what kind, quality, and quantity of discretion can be permissibly delegated? What are the constitutional boundaries between permissible delegations of discretion and unconstitutional delegations of uniquely legislative

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<sup>25</sup> *Am. Trucking Ass’n, Inc. v. EPA*, 175 F.3d, 1027, 1034 (D.C. Cir. 1999), *aff’d in part, rev’d in part*, *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Whitman*, 531 U.S. at 472.

<sup>28</sup> *Id.* at 475 (quoting *Mistretta v. U.S.*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

<sup>29</sup> *Id.* at 472.

<sup>30</sup> *Id.* at 474.

<sup>31</sup> *FCC v. City of Arlington*, 133 S. Ct. 1863, 1879 (2013).

power? As in many areas of the law, clear answers are elusive. Since the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,”<sup>32</sup> the borders of the non-delegation doctrine will probably remain ill-defined until and unless Congress reaches the mythical “bridge too far.” In the meantime, the “junior-varsity Congress,” as Justice Scalia put it in *Mistretta*, continues to extend and consolidate its authority.

## B. The Growth of Deferential Judicial Review

Although formal deference to administrative interpretations of statutes is a relatively recent development in American jurisprudence, the Supreme Court has historically expressed “great respect” for interpretations of “doubtful and ambiguous law” by those “who were called upon to act under the law, and ... carry its [statutory] provisions into effect.”<sup>33</sup> This respect matured into a formal doctrine of judicial deference in *Bowles v. Seminole Rock & Sand Co.*<sup>34</sup> in which the Supreme Court held:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*<sup>35</sup>

Significantly, *Seminole Rock* was decided before Congress enacted the Administrative Procedure Act (APA) in 1946.<sup>36</sup> As shall be seen below, the decision’s vitality has persisted

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<sup>32</sup> *Whitman*, 531 U.S. at 474-75 (internal quotations, citations, omitted).

<sup>33</sup> *Edwards’ Lessee v. Darby*, 25 U.S. 206, 210 (1827).

<sup>34</sup> 325 U.S. 410 (1945).

<sup>35</sup> *Id.* at 413-14 (emphasis added).

<sup>36</sup> 5 U.S.C. § 551 *et seq.* (1946).

notwithstanding the APA's textual hostility to deferential judicial review and the Constitution's insistence on independent judicial judgment.

## 1. Judicial Deference and the APA

The APA was the “product of a hard fought political battle over the place of the agencies in the government and the future of New Deal policies.”<sup>37</sup> Apprehension regarding the creation of a new bureaucracy and how abuses could be prevented was a central concern. For this reason, the APA was “framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”<sup>38</sup> It created “safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.”<sup>39</sup> How courts would review regulations and how statutory programs might be maintained and enhanced, or challenged and diminished, were critical issues.

A “fierce compromise” resolved the ideological struggle that nearly sank the APA's passage.<sup>40</sup> The APA provides that that “the *reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>41</sup> Additionally the statute provides that “[t]he

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<sup>37</sup> Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 789 (2010) (hereafter “Beerman”).

<sup>38</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950) (emphasis added).

<sup>39</sup> *Ibid.*

<sup>40</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1581–82 (1996); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180, 200, 206 (1999).

<sup>41</sup> 5 U.S.C. § 706 (2006) (emphasis added).

*reviewing court* shall ... hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*[.]”<sup>42</sup>

Accordingly, the text of the APA *does not reserve any authority for the agencies to definitively interpret the law*, much less any true “lawmaking” power to which the judiciary must defer. The APA’s commands “seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative agencies.”<sup>43</sup> Moreover, many courts, including the Supreme Court, have stressed that the language of the APA was forged from years of study and debate, and hence, its language should not be “lightly disregarded.”<sup>44</sup> Since the APA’s plain language only enables “reviewing courts” to “decide the meaning or applicability” of statutes and regulations, it necessarily *precludes* courts from deferring to agency interpretations. Instead, courts must decide those issues the same way they resolve all other interpretive controversies—by exercising their *independent judgment*.

To the extent legislative history is appropriate to consider when the APA’s text is plain and unambiguous, the statute’s legislative history “leaves no doubt that Congress thought the meaning of this provision plain.”<sup>45</sup> “As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House shortly before the bill’s passage, the provision ‘requires courts to

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<sup>42</sup> *Id.* at § 706(2) (emphasis added).

<sup>43</sup> Beerman, *supra* note 37 at 788.

<sup>44</sup> See generally, *id.* at 788-89; See, e.g., *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523, 547-48 (1978) (noting that the APA was a legislative enactment that settled “long-continued and hard-fought” contentions); *In re Lueders*, 111 F.3d 1569, 1576 (Fed. Cir. 1997) (documenting the legislative history of the APA).

<sup>45</sup> Beerman, *supra* note 37 at 789.

determine *independently* all relevant questions of law, including the interpretation of constitutional or statutory provisions.”<sup>46</sup>

## 2. Judicial Deference and the Constitution

The independent judgment mandate is not derived from the APA alone. As early as 1776, Thomas Paine recognized that “in absolute governments the king is law,” but “[i]n America the law is king.”<sup>47</sup> Consistent with Paine’s philosophy, the Declaration of Independence strongly objected to the British Crown’s usurpation of judicial independence. As a result of these beliefs and experiences, judicial independence is firmly grounded in Article III of the United States Constitution. Since it is “emphatically” the judiciary’s constitutional duty to “say what the law is,”<sup>48</sup> courts cannot avoid that responsibility by deferring to interpretations of statutes and regulations coined by the legislative and Executive Branches. Although a court may *agree* with an agency’s interpretation, that decision must be based upon the court’s independent exposition and interpretation, not upon deferential indulgence of an agency’s opinion.<sup>49</sup>

One of the most recent and thorough discussions of the constitutional requirement of independent judgment and its inconsistency with deferential judicial review comes from Justice Thomas’s concurring opinion in *Perez v. Mortgage Bankers Association*.<sup>50</sup> Justice Thomas wrote separately in *Perez* because he believed the holding “call[ed] into question”

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<sup>46</sup> John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193-94 (1998), quoting 92 Cong. Rec. 5,654 (1946) (statement of Rep. Walter) (emphasis added); see also Beerman, *supra* note 37, at 789.

<sup>47</sup> THOMAS PAINE, COMMON SENSE AND RELATED WRITINGS 72, 98 (Thomas P. Slaughter ed., 2001).

<sup>48</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>49</sup> *Ibid* (“Those who apply the rule to particular cases must, of necessity expound and interpret that rule.”).

<sup>50</sup> 135 S. Ct. 1199 (2015). [Ed. Note: WLF filed an *amicus* brief in support of the Respondent]

the line of cases, including *Seminole Rock*, that “requires judges to defer to agency interpretations of regulations.”<sup>51</sup> According to Justice Thomas, “[b]ecause this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”<sup>52</sup>

The dynamic relationships created by the Constitution’s checks and balances necessarily require the exercise of independent judicial judgment. Given the structural distinctions among the three branches of government, and the potential conflicts that may arise between the Legislative and Executive Branches, independent judicial determinations are necessarily definitive and final when controversies arise.<sup>53</sup> In this way, courts also act as a mediating influence interposed between the President, Congress, and the people to ensure that those branches act “within the limits assigned to their authority.”<sup>54</sup> Although political concerns and “popular sentiment” may influence the President and Congress to “abandon the strictures of the Constitution or other rules of law,”<sup>55</sup> the judiciary is “insulated from both internal and external sources of bias,” and is “duty bound” to “exercise independent judgment in applying the law.”<sup>56</sup>

Independent judicial judgment of regulations is critical because they have the force and effect of law, define standards of legal conduct, and can be used in actions against

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<sup>51</sup> *Id.* at 1213 (Thomas, J., concurring).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id.* at 1219 (Thomas, J., concurring).

<sup>54</sup> THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>55</sup> *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring) (emphasis added).

<sup>56</sup> *Ibid.*

regulated parties.<sup>57</sup> The same independent judgment that constitutionally empowers courts to say what the law is necessarily authorizes them to hear and decide disputes involving regulations and regulated parties—controversies which inevitably include defining the legal meaning of the regulation and deciding whether a particular regulation “covers the conduct of members of the regulated community.”<sup>58</sup> These quintessential examples of judicial authority are necessarily and exclusively entrusted to the courts. Requiring courts to defer to agency interpretations vitiates the judiciary’s constitutional role by shifting interpretative judgment to the Executive Branch—not even to the President, who rarely is involved in such activities, but to the vast, unelected bureaucracy of the Administrative State. The end result, therefore, is the very “plurality of the executive” that the founders condemned because it tended “to conceal faults and destroy responsibility.”

Abandonment of the judiciary’s primary interpretative authority also sacrifices its responsibility to determine the *best* meaning of statutes and regulations. As Justice Thomas recently wrote:

*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is the ‘best reading of an ambiguous statute’ in favor of an agency’s construction ... It thus wrests from Courts the ultimate interpretative authority to “say what the law is” and hands it over to the Executive.<sup>59</sup>

The judiciary presently defers to agency interpretations even though the bureaucracy of the Administrative State lacks the constitutional safeguards against undue political

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<sup>57</sup> *Ibid* (Thomas, J., concurring); see also *U.S. v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to further the fairness and deliberation that should underlie a pronouncement of such force.”).

<sup>58</sup> *Ibid* (Thomas, J., concurring).

<sup>59</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (internal citations omitted).

influence that ensure judicial independence, including life tenure and salary protection.<sup>60</sup> Without such protections, agencies, as creatures of the political branches, are therefore not properly constituted to exercise the judicial power under the Constitution. Beyond these protections, judges also have an *internal* duty to exercise independent judgment and avoid prejudices regarding the parties' legal interpretations. The founders insisted that "Judges ought to carry into the exposition of the laws no prepossessions with regard to them."<sup>61</sup> Yet judicial deference requires reviewing courts to indulge prepossessions in favor of agency interpretations that, when viewed independently, may lack the intellectual, legal, and factual justifications objectively necessary for approval. Indeed, like its modern synonym "prejudice," the archaic term "prepossession" suggests a "fixed conception likely to preclude objective judgment of anything counter to it."<sup>62</sup>

As a result, when courts defer to agencies' interpretations of their own governing statutes or regulations, they indulge a judicially-created "prejudice" that compromises the judiciary's otherwise independent judgment. This indulgence fundamentally weakens the judiciary's internal disposition against undue influence, as well as the protections against political pressures provided by the Constitution—precautions that guarantee that "the interpretation of laws is the proper and *peculiar* province of the courts."<sup>63</sup> With this guarantee, citizens are assured that judges credibly and authoritatively exercise the authority

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<sup>60</sup> See U.S. CONST. art. III, sec. 1.

<sup>61</sup> 2 *Records of the Federal Convention of 1787*, at 79 (Statement of Nathaniel Ghorum); see also PHILLIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008), at 507-12 (analyzing judiciary's internal duties as component of independent judgment).

<sup>62</sup> See MERRIAM WEBSTER ONLINE DICTIONARY, at <http://www.merriam-webster.com/dictionary/prepossession>.

<sup>63</sup> THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

of their offices<sup>64</sup>—but when courts defer to legal interpretations coined by regulatory agencies, they adopt the political colors of the Administrative State. In doing so, judges not only surrender their unique constitutional responsibilities, they also compromise their independent authority and credibility. Even if the separation of powers remains intact after such deferential judicial practices, the relative power of the Judicial Branch is necessarily diminished, leaving a weaker judiciary to guard our liberties.

Nothing in the Constitution, the APA, or any other controlling authority requires the Supreme Court to continue tolerating this imbalance. Indeed, the Constitution’s mandate for independent judgment and the APA’s entrustment of interpretations to reviewing courts require precisely the contrary. With the assistance of a cooperative judiciary, the great plurality of the Administrative State has usurped important powers originally delegated to the formerly separate branches—and integrated them into a powerful fourth branch that is capable of seizing even more expansive authority within its grasp.

### **3. Types of Judicial Deference—A Critical Analysis**

Notwithstanding the demands of the Constitution and APA for courts to exercise independent judgment, the Supreme Court and the lower courts nevertheless indulge deferential judicial review of agency interpretations of statutes and regulations in three circumstances—*none* of which are textually permissible under the APA or viable under the United States Constitution:

- *Chevron* deference: Deference to agencies’ interpretations of statutes they are charged to administer.<sup>65</sup>

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<sup>64</sup> See HAMBURGER, *supra* note 61 at 543-48 (addressing authority of judicial interpretations).

<sup>65</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

- *Auer* deference: Deference to agencies’ interpretations of their own regulations—even if they are vague or ambiguous.<sup>66</sup>
- *Baltimore Gas* deference: “Extreme deference” or “super deference” to agencies’ scientific conclusions in the course of rulemaking.<sup>67</sup>

Given the APA’s clear insistence on independent judicial interpretation of statutes and regulations, as opposed to deferential review, it is difficult to understand how these doctrines can be justified. Moreover, since the APA was enacted after *Seminole Rock* was decided, Congress must not only be presumed to have been aware of the *Seminole Rock* rule when the APA was enacted,<sup>68</sup> but also should be presumed to have vitiated *Seminole Rock*’s holding by enacting the APA’s contrary language.<sup>69</sup> This section will examine the viability of each type of deference listed above.

#### a. ***Chevron* Deference**

Although the path the Supreme Court followed to each of these deferential perspectives differed, the origins of *Chevron* deference are illustrative. In *Chevron*, the Court signaled its intent to depart from the APA’s language when it *paraphrased*—rather than quoted—the APA’s standard of review. The Court stated that when Congress explicitly leaves

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<sup>66</sup> *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>67</sup> *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87 (1983).

<sup>68</sup> *Hall v. United States*, 132 S. Ct. 1882, 1889 (2012).

<sup>69</sup> Of course, the Court has yet to accept that position, but the argument has not lacked support, most notably in Justice Scalia’s concurring opinion in *Perez*, 135 S. Ct. at 1211:

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations. Never mentioning § 706’s directive that the ‘reviewing court ... interpret ... statutory provisions,’ we have held that *agencies* may authoritatively resolve ambiguities in statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984). And never mentioning § 706’s directive that the ‘reviewing court ... determine the meaning or applicability of the terms of an agency action,’ we have—relying on a case decided before the APA, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, (1945)—held that *agencies* may authoritatively resolve ambiguities in regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Ibid.*

a statutory gap for the agency to fill, “legislative regulations are given controlling weight unless they are arbitrary, capricious, or *manifestly contrary to the statute*.”<sup>70</sup> The *Chevron* Court’s paraphrase differs dramatically from the actual text of the APA, which states that the reviewing court should overturn agency action found to be “arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*.”<sup>71</sup>

Contrary to the *Chevron* Court’s narrow paraphrase, nothing in the APA’s text justifies constricting review only to vagueness or ambiguities in the statute or regulation under review. Indeed, since the APA’s text broadly encompasses the entire range of federal law, as opposed to the individual statute under review, it must be construed to be inconsistent with *Seminole Rock*—which focused only on the regulation being considered.<sup>72</sup> Read properly in context, the APA abrogates *Seminole Rock*’s narrow focus and requires the reviewing court to reject agency actions whenever inconsistent with the broad range of federal law—as opposed to ignoring that expansive array to concentrate only on the rule or regulation under review.<sup>73</sup> Such an interpretation inevitably entails broader review and mandates none of the deference that *Chevron*’s holding erroneously prescribes.

Although the Supreme Court’s most recent term did not provide another opportunity for Justice Thomas to emphasize his wholesale opposition to *Chevron* deference, one of the Court’s most recent decisions “chipped away” at *Chevron* to deny deference if agencies failed

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<sup>70</sup> *Chevron U.S.A., Inc.*, 467 U.S. at 844 (emphasis added).

<sup>71</sup> 5 U.S.C. § 706 (1)(A) (2006) (emphasis added).

<sup>72</sup> See *Seminole Rock*, 325 U.S. at 414. (“But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or *inconsistent with the regulation*.”) (emphasis added).

<sup>73</sup> See Patrick Smith, *Chevron’s Conflict with the Administrative Procedure Act*, 32 VA. TAX. REV. 813 (2013).

to provide adequate reasons to justify their statutory interpretations.<sup>74</sup> Nevertheless, this procedural requirement is a far cry from dismantling the doctrine itself. The Court’s holding was definitively based on the agency’s failure to explain its reasoning—not upon hostility to *Chevron* deference:

Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department’s conclusory statements do not suffice to explain its decision ... This lack of reasoned explication for a regulation that is inconsistent with the Department’s longstanding earlier position results in a rule that cannot carry the force of law ... It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.<sup>75</sup>

In another recent case, the High Court invoked *Chevron* to defer to the Patent and Trademark Office’s (“PTO”) construction of a patent claim according to its “broadest reasonable construction.”<sup>76</sup> In doing so, the Court refused to limit PTO’s rulemaking authority under its governing statute to “procedural” issues and deferred to PTO’s interpretation that its power also extended to substantive concerns.<sup>77</sup> Although Justice Thomas concurred in the majority’s result, he concluded that the Court avoided his “constitutional concerns” because the governing statute contained an “express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceedings.”<sup>78</sup>

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<sup>74</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. at \_\_\_, Slip Op. at 12 (June 20, 2016), available at [http://www.supremecourt.gov/opinions/15pdf/15-415\\_mlho.pdf](http://www.supremecourt.gov/opinions/15pdf/15-415_mlho.pdf)

<sup>75</sup> *Ibid.*

<sup>76</sup> *Cuozzo Speed Technologies v. Lee*, 579 U.S. \_\_\_, Slip Op. at 17 (June 20, 2016), available at [http://www.supremecourt.gov/opinions/15pdf/15-446\\_ihdk.pdf](http://www.supremecourt.gov/opinions/15pdf/15-446_ihdk.pdf)

<sup>77</sup> *Id.* at Slip. Op. 13-14.

<sup>78</sup> *Id.* (Thomas, J. concurring, at 2).

## b. *Auer* Deference

*Auer* deference rests on even thinner ice. Four Supreme Court justices (Roberts, Scalia, Thomas, and Alito) expressed concerns about its viability over the past several years.<sup>79</sup> Justice Scalia powerfully expressed the reasoning underlying the criticism of *Auer* deference in his *Decker v. Northwest Environmental Defense Center* dissent:

While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. ‘When the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.’ Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).<sup>80</sup>

With this reference to Montesquieu, Justice Scalia squarely focused his reasoning on separation-of-powers principles:

*Auer* deference encourages agencies to be ‘vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice and comment procedures.’ ... *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power. ... In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudicate its violation.<sup>81</sup>

Further calls for abolishing *Auer* deference occurred in the Supreme Court’s October 2014 term in *Perez*. Justices Scalia, Alito, and Thomas wrote separate concurring opinions reiterating their call for abolishing this form of deference. In particular, Justice Thomas noted

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<sup>79</sup> See generally, Agron Etemi, *To Defer or Not to Defer: Why Chief Justice Roberts Got It Right in City of Arlington v. FCC*, available at <http://www.pennstatelawreview.org/penn-statim/to-defer-or-not-to-defer-why-chief-justice-roberts-got-it-right-in-city-of-arlington-v-fcc/>.

<sup>80</sup> 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting).

<sup>81</sup> *Id.* at 1342.

two recurring scenarios where *Auer* and *Seminole Rock* deference interferes with the judiciary’s constitutional duty to “exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.”<sup>82</sup>

First, although “defining the legal meaning” of regulations is a singular judicial responsibility, Justice Thomas reasoned that deference “precludes judges from independently determining that meaning.”<sup>83</sup> In his view, deference is an unconstitutional “transfer of the judge’s exercise of interpretive judgment to the agency” that “lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III.”<sup>84</sup> Since the agency is “not properly constituted to exercise the judicial power under the Constitution,” Justice Thomas concluded that “the transfer of interpretive judgment raises serious separation of powers concerns.”<sup>85</sup>

Second, Justice Thomas concluded that *Auer* and *Seminole Rock* deference undermine an essential judicial check on the excesses of the Legislative and Executive Branches of government.<sup>86</sup> Although the Constitution provides those branches with several checks on each other’s power, the judiciary has only one—the “enforcement of the rule of law through the exercise of judicial power.”<sup>87</sup> With this power, the judiciary checks the other two branches of government to maintain the constitutional equilibrium among the branches necessary to preserve the rights of the people—from whom all power is derived. Because judges are constitutionally required to decide cases and controversies within their

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<sup>82</sup> *Perez*, 135 U.S. at 1219 (Thomas, J., concurring).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Id.* at 1219-20.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Id.* at 1220-21.

<sup>87</sup> *Id.* at 1220.

jurisdiction, they cannot opt out of their constitutional duties to check the power of other branches of government.<sup>88</sup> As a result, courts cannot abandon deciding legitimate cases by indulging administrative agencies with deferential review. Otherwise, they permit “precisely the accumulation of governmental powers that the Framers warned against.”<sup>89</sup>

Unfortunately, Justice Scalia’s death removed what appeared to be a critical vote that was likely necessary for reviewing *Auer* deference.

### c. ***Baltimore Gas Deference***

*Baltimore Gas* deference is also vulnerable. The Supreme Court held that courts must give the strongest deference when an agency is “making predictions, within its area of special expertise, at the frontiers of science ... as opposed to simple findings of fact.”<sup>90</sup>

Notwithstanding the vague nature of this standard, the Court has not elaborated on its meaning. Hence, as a practical matter, scientific conclusions within an agency’s special expertise essentially receive *no review at all*.

This form of deference has been referred to as “extreme deference” or “super deference,”<sup>91</sup> and it denigrates the role of the courts much more than *Chevron* or *Auer* by replacing critical judicial review with the functional equivalent of a rubber stamp. Moreover, it encourages agencies to “cloak policy decisions in a shroud of science, exaggerating the role of science to the detriment of administrative-law values, statutory goals, and science itself.”<sup>92</sup>

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<sup>88</sup> *Id.* at 1221.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Baltimore Gas*, 462 S. Ct. at 103.

<sup>91</sup> Emily Hammond Meazell, *Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 734 (2011).

<sup>92</sup> *Id.* at 752; see generally, Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COL. L. REV. 1613 (1995).

Anticipating “extreme deference,” agencies can camouflage their policy preferences as science to shield them from meaningful judicial review.<sup>93</sup>

In perhaps the most notable recent application of *Baltimore Gas* deference, the DC Circuit gave extreme deference to EPA’s scientific findings regarding global climate change.<sup>94</sup> The court did so even though EPA bypassed its own Science Advisory Board, which it was required by law to consult,<sup>95</sup> and primarily relied upon the conclusions of “major assessments” addressing greenhouse gases and climate change issued by the Intergovernmental Panel on Climate Change (IPCC), the U.S. Global Climate Research Program (USGCRP), and the National Research Council (NRC).<sup>96</sup> The court found that “in reviewing the science-based decisions of agencies such as EPA, ‘[a]lthough we perform a searching and careful inquiry into the facts underlying the agency’s decisions, we will presume the validity of agency action as long as a rational basis for it is presented.’”<sup>97</sup> It reiterated that in making that evaluation, courts will “give an *extreme degree of deference* to the agency when it is evaluating scientific data within its technical expertise.”<sup>98</sup>

The use of *Baltimore Gas* deference to assess a regulation that impacts scientific and economic concerns on a global scale is troubling regardless of one’s view regarding climate

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<sup>93</sup> See Elizabeth Fisher, Pasky Pascual, Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1716 (2015) (“Complex scientific analyses may conceal deceptive, ends-oriented decisions that have been camouflaged from public view under scientific rhetoric and other devices.”).

<sup>94</sup> *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (DC Cir. 2012), *aff’d in part, rev’d in part*, 134 S. Ct. 2427 (2014).

<sup>95</sup> 684 F.3d at 124.

<sup>96</sup> *Id.* at 119-120.

<sup>97</sup> *Id.* at 120, quoting *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (DC Cir. 2009).

<sup>98</sup> *Ibid* (emphasis added) (internal quotations omitted).

change. This is especially true when judicial scrutiny of scientific evidence has intensified dramatically in civil and criminal actions over the past few decades.

Since the Court decided *Baltimore Gas* in 1983, the evidentiary rules governing scientific evidence in civil and criminal judicial proceedings have undergone revolutionary changes. Formerly, federal courts used highly deferential standards to determine the admissibility of expert testimony in litigation, irrespective of whether the cases were based in civil or criminal law.<sup>99</sup> Judicial scrutiny of expert opinions was minimal and admissibility largely turned on questions regarding the experts' qualifications.<sup>100</sup> In the 1990s, however, the Court issued three major decisions that created new standards for determining the reliability of expert opinions and that enhanced the scrutiny applied when determining admissibility.<sup>101</sup> Thereafter, the judiciary amended Federal Rule of Evidence 702 to allow the admission of expert testimony only when opinions satisfied tighter reliability requirements.<sup>102</sup>

Advocates of extending *Daubert's* reliability analysis to administrative proceedings argue that good science is no less important in making policy decisions than in individual lawsuits. Among other arguments, they assert that "if private litigants are entitled to rules requiring sound science to protect parochial interests, certainly the public should be equally

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<sup>99</sup> See, e.g., David H. Kaye *et al.*, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 2.1 (2d ed. 2010).

<sup>100</sup> *Ibid.*

<sup>101</sup> See *Daubert v. Merrill Dow Pharms. Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); see generally, David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351 (2004).

<sup>102</sup> See David E. Bernstein and Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1 (2015) (discussing 2000 amendments to Rule 702 and proposing additional revisions).

assured that good science is the foundation for national action.”<sup>103</sup> Given the trend toward enhanced review of scientific evidence in litigation, it seems reasonable that a similar process should govern administrative proceedings and, more importantly, judicial evaluations of proposed rules and regulations.

Professor Emily Hammond Mezell has offered six additional concerns regarding super deference:

- Extraordinary deference stands in tension with the expectation that courts must reinforce administrative-law values like participation, transparency, and deliberation.<sup>104</sup>
- Administrative agencies cannot make an exclusive claim on science because science plays a legitimizing role throughout government. Suppose an administrative agency were to make a fundamental scientific error that becomes the basis of a regulation. A judicial rule requiring extreme deference—even to blatant scientific errors—would magnify those errors and produce unfair results.<sup>105</sup>
- If fairness and rationality are both furthered when agencies capture the best that science can offer, perhaps a more searching role for the courts—one that encourages agencies’ principled use of science—is called for.<sup>106</sup>

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<sup>103</sup> Alan Charles Raul and Julie Zampa Dwyer, “Regulatory Daubert”: A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles into Administrative Law, 66-AUT LAW & CONTEMP. PROBS. 7 (2003). See also D. Hiep Truong, *Daubert and Judicial Review: How Does an Administrative Agency Distinguish Valid Science from Junk Science?*, 33 AKRON L. REV. 365, 386 (2000) (“By using the *Daubert* standards, the Court is not second-guessing the agency’s decision making, but is simply ensuring ... that the evidence relied upon by the agency meets the same threshold requirements that a federal litigant is already subjected to.”); Charles D. Weller & David B. Graham, *New Approaches to Environmental Law and Agency Regulation: The Daubert Litigation Approach*, 30 ENVTL. L. REP. 10557 (2000); Andrew Trask, *Daubert and the EPA: An Evidentiary Approach to Reviewing Agency Determinations of Risk*, 1997 U. CHI. LEGAL FORUM 569 (“Applying the *Daubert* gatekeeping function therefore allows courts to check the validity of the agency’s reasoning while maintaining the proper amount of deference to the agency’s rulemaking and adjudicative powers.”); but see generally, David E. Bernstein, *What to Do About Federal Agency Science: Some Doubts About Regulatory Daubert*, 22 GEO. MASON L. REV. 549 (2015).

<sup>104</sup> Mezell, *supra* note 91 at 739.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

- Agency science is a peculiar product, quite removed from the traditional image of pure research science. It is laced with policy decisions at numerous levels, making it susceptible to misuse.<sup>107</sup>
- Calls for “good” or “improved” science in agencies are often motivated by the desire to change policy outcomes rather than agencies’ use of flawed science in reaching them.<sup>108</sup>
- Measured against broader administrative-law values, super deference also inhibits transparency; undermines deliberation; fails to accord with political accountability; and generally abdicates the courts’ role in the constitutional scheme by encouraging outcome-oriented review.<sup>109</sup>

Despite all these flaws, the courts have so far shown little interest in curtailing the use of super deference.

In the interim, it appears that modern agency fact finding is increasingly morphing into a quest for policy, influenced, but not always dictated by, the truth. This process has been aptly named the “Science Charade”—a phenomenon wholly alien to the APA—yet nourished and encouraged by deferential judicial review. Professor Wendy Wagner coined the phrase in her seminal article, *The Science Charade in Toxic Risk Reduction*.<sup>110</sup> The Science Charade arises when “agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions.”<sup>111</sup> According to Professor Wagner, deferential judicial review exacerbates the problems associated with the Science Charade:

If an agency can represent to the court that its technical explanations for a toxic standard lie on the ‘frontiers of scientific inquiry,’ a term that easily encompasses trans-scientific issues, the agency decision is subject only to the

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<sup>107</sup> *Id.* at 739-40.

<sup>108</sup> *Id.* at 740.

<sup>109</sup> *Id.* at 738.

<sup>110</sup> Wagner, *supra* note 92.

<sup>111</sup> *Id.* at 1617.

most cursory review. By insisting on technical justifications on the one hand, and pledging not to scrutinize the accuracy of the technical explanations on the other, the courts not only fail to prevent the science charade, they make it almost obligatory.<sup>112</sup>

Professor Wagner's studies motivated another scholar to observe the existence of a "Reverse Science Charade," which occurs when agencies *exaggerate the limitations* of science and risk analysis "to justify regulation on the basis of policy choices—choices that are commonly embodied in default assumptions and safety factors."<sup>113</sup>

Given these administrative manipulations of scientific principles, it is not surprising that an entire branch of science has been christened "Regulatory Toxicology" to deal with risk assessments and the promulgation of governmental standards.<sup>114</sup> This methodology allows agencies to determine causation for *preventive* purposes under less reliable standards than those used by judges and juries to decide whether substances actually caused injury in specific persons. Hence, the environments of entire populations and workers may be regulated even though their anticipated exposures are not admissible in courts to show any particular person has been harmed.<sup>115</sup> Indeed, regulatory toxicology profoundly differs from the truth-seeking goals of science:

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<sup>112</sup> *Id.* at 1664-66. See also Meazell, *supra* note 91 at 752 ("If agencies know that courts will be at their most deferential when reviewing scientific determinations, they will rationally emphasize the scientific aspects of their decisions to the detriment of clearly identifying the policy decisions filling the scientific gaps.")

<sup>113</sup> James W. Conrad, *The Reverse Science Charade*, 33 ENVTL. L. REP. 10306 (2003).

<sup>114</sup> See generally, CASARETT AND DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS at 1413 (8th ed. 2013).

<sup>115</sup> See, e.g., *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 n. 3 (10th Cir. 1999) (holding that regulatory methodology "results from the preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances," and that regulatory standards are "reasonably lower because tort cases traditionally make more particularized inquiries into cause and effect."); *Allen v. Pa. Engineering Corp.*, 102 F.3d 194 (5th Cir. 1996) (holding that "weight of the evidence" analysis used by agencies to determine carcinogenicity of a substance is not an acceptable methodology to show causation in tort litigation); see generally Knight S. Anderson, *Government Action Does Not Equal Proximate Causation* (American Bar Assn., June 11, 2012); David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOKLYN L. REV. 51, 52-55 (2008) (reviewing development of the concepts and discussing authorities).

This explanation begins by recognizing a central difference between the goals of science and those of government. Science investigates and attempts to explain natural phenomena; it is cautious, incremental and truth-seeking. Government, in its capacity as regulator, seeks to affect human behavior and settle human disputes; it is episodic and peremptory and pursues resolution rather than truth.<sup>116</sup>

“Affecting human behavior” may be a viable goal of regulatory activity, but separating that aim from the search for objective scientific truth yields aspirational policies—not necessarily realistic or reasonable precautions.

For example, regulatory agencies do not typically apply the same causation standards applied in civil lawsuits alleging toxic injuries, but rather use prophylactic exaggerations that require occupational exposures to be vastly lower.<sup>117</sup> Although some argue that the standards should be harmonized to conform to the litigation rules, others insist that preventing future illnesses is an exercise in *policy* that is not wholly controlled by existing scientific knowledge:

Agencies are charged by Congress not only with creating and interpreting scientific evidence, but in many cases with *determining what the relevant standard of proof should be*. Unlike bad science, bad policy is not a *Daubert* question. Judicial interference in scientific decision making by agencies risks having judges making not just evidentiary determinations about the quality of evidence presented, but intertwined policy decisions outside the scope of judicial authority.<sup>118</sup>

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<sup>116</sup> CASARETT AND DOULL’S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 1141 (6th ed. 2010).

<sup>117</sup> See Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL’Y 589, 590 (2004) (“Regulators generally err on the side of protecting the public health and environment when crafting protective regulatory standards and do not require vigorous gate-keeping of scientific evidence.”); Peter Huber, *Public Versus Private Environmental Regulation*, 21 ECOLOGY L.Q. 445, 448 (1994) (“A risk analyst can always draw a larger circle in space and time, postulate new pathways for release, measure contamination at lower levels, and raise concerns about smaller, longer-term effects among larger groups of people.”).

<sup>118</sup> Bernstein, *What to Do About Federal Agency Science: Some Doubts About Regulatory Daubert*, at 553 (emphasis added).

Using this policy-oriented perspective, agencies currently regulate exposures at levels necessary to *prevent* illnesses—irrespective of whether such reduced exposures have been shown to cause disease. Agencies are charged not only with “creating and interpreting scientific evidence, but in many cases with determining what the relevant standard of proof should be.”<sup>119</sup> For that reason, “risk assessment is not a purely scientific exercise.”<sup>120</sup>

In this way scientific truth is trumped by policy considerations—and the accompanying social and financial consequences are deemed worth the effort and cost necessary to protect public health. Although these agency decisions are not governed by the rules of evidence used in court proceedings, they nevertheless receive extreme deference when challenged in court.

## CONCLUSION

The decline of the non-delegation doctrine opened the door for a broad expansion of executive authority over American life, fostering a migration of power from Congress, the most politically accountable branch of government, to executive agencies, the least politically accountable branch. As a result, the power of the Executive Branch has been dramatically enhanced, and its accountability has been substantially diminished.

Concurrently, the Judicial Branch has indulged administrative decisions with increasing degrees of deferential review in statutory and regulatory interpretation—even when the regulations’ vagueness or ambiguity is created by the agencies themselves. The courts have given even greater deference to agencies’ scientific conclusions, virtually abstaining from review irrespective of vast impacts on regulated parties, private citizens, and

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<sup>119</sup> *Ibid*; see also Thomas O. McGarity, *On the Prospect of “Daubertizing” Judicial Review of Risk Assessment*, 66 LAW & CONTEMP. PROBS. 155, 156 (2003).

<sup>120</sup> McGarity at 156.

the American economy. The judiciary's decision to remain purposefully aloof from these issues further enhances the arrogation of power by the Executive Branch.

Based upon these developments, constitutional power is tipping inexorably toward expansive executive power—evidenced by the birth and growth of an “Administrative State”—a fourth branch of government that receives inadequate constraint by Congress, the courts or, for that matter, the President and his officers. As with inadequately disciplined children, the Administrative State has grown into a problem child, one that is developing into a threatening and politically unaccountable force. In many respects, that force is the antithesis of the dynamic and interactive Republic envisioned by our Constitution.

Indeed, America seems to be evolving into a society that is *administered* by our regulators, rather than *governed* by our representatives. The difference between these scenarios is profound: those who are governed have a truly democratic voice in their future, while those who are administered merely do what they are told. Rather than empowering citizens with liberty, the expanding Administrative State increasingly threatens to render citizens “nothing more than a herd of timid and industrious animals, of which the government is the shepherd.”<sup>121</sup>

Members of the Supreme Court have not been silent regarding their concerns, and their repeated warnings suggest that the Court's concerns may be deeper than isolated instances of judicial review. Moreover, the growing Administrative State surely will serve up new examples of administrative overreach certain to provoke arguments for greater scrutiny. All signs indicate that, although the thunder has been heard, and the lightning has flashed, the full force of the constitutional storm has not yet broken.

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<sup>121</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. 2, Ch. 6, at 663 (U. Chicago Press, 2000).

In the absence of Supreme Court action, it seems unlikely that the Administrative State can be restrained from broader intrusions into American life. Regulations have proliferated even during the administrations of Presidents who espoused a desire to shrink the size and sweep of government. The same can be said for Congress which, regardless of which party held control over one or both chambers, has either failed to legislate—which leaves bureaucrats and law-enforcement officials to essentially “make” law—or has continued to adopt statutes that delegate vast authority to federal agencies.

Although a bill to restrict judicial deference recently passed the House of Representatives,<sup>122</sup> its reception in the Senate is uncertain. More importantly, the bill fails to curtail the arrogation of executive power caused by Congress’ unilateral delegation of its lawmaking power to the Executive Branch, which was the seminal event that gave rise to the Administrative State in the first place. Even the name of the bill, which is entitled “The Separation of Powers Restoration Act,”<sup>123</sup> reveals that it is primarily concerned with restoring the “separation” of authority between the branches of government—rather than their balance.

Until Congress restrains *itself* from unreasonably delegating lawmaking authority to the Executive Branch, unilaterally reforming the judiciary remains an incomplete solution. Just as “nature abhors a vacuum,” history teaches that political power—unless adequately controlled—inevitably rushes to occupy and displace authority reserved to the people. Faced with that dangerous dynamic, it is reasonable to ask whether and how long our constitutional separation of powers—and our democracy—can endure.

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<sup>122</sup> H.R. 4768, 114<sup>th</sup> Cong. (2016) (as passed by House of Representatives, July 12, 2016).

<sup>123</sup> *Ibid.*