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Bureaucratic Overreach and the Role of the Courts in Protecting Representative Democracy

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Introduction

Actions taken by bureaucratic agents of the federal government reach nearly every sphere of public life and carry cumbersome consequences for everyday Americans. For example, the United States Department of the Interior and Department of Agriculture prohibit mining on 225,000 acres of Minnesota land which is home to extensive natural mineral supplies.[1] The Department of Energy proposes strict new requirements for limiting the energy used by gas stoves in American homes.[2] 7.5 billion taxpayer dollars are directed towards a new government taskforce to construct a national electric vehicle charging network.[3] In potential violation of the nondelegation doctrine, Congress has failed to provide clear procedural directives and legislative intention. This failure allows the American bureaucracy to issue regulations which carry the force of law while simultaneously escaping the accountability required of elected officials.[4] Unelected agents in the American bureaucracy wield a disproportionate amount of power and threaten to topple the delicate checks and balances inherent within the American republic's design. In 2020 alone, federal agencies issued nineteen rules and regulations for each law passed by Congress, amounting to 3,353 rules in comparison to the 178 laws Congress passed.[5] A lack of Congressional oversight, abuses of executive authority by American presidents, and a lack of action from the highest court in the land have all contributed to this rise in bureaucratic increase. Each branch of government, especially the Supreme Court, must return to its constitutional functions to reign in what has become an out-of-control regulatory state.

The Founding Fathers' Judicial Design

America's Founding Fathers embarked on an endeavor to establish a democratic republic, the likes of which was unparalleled when the United States declared independence from England in 1776.[6] In 1787, the Founders solidified this constitutional design by setting forth a government created with checks and balances as well as a separation of powers between the legislative, executive, and judicial branches.[7] Legislative power was vested solely in a bicameral legislature which enjoys a plethora of enumerated powers. Among these are powers such as regulating

[1] Kristen Altus, "Biden Slaps 20-Year Mining Ban on Minnesota Land, Gives More Power to China," FOX Business, February 3, 2023, https://www.foxbusiness.com/politics/biden-slaps-20-year-mining-ban-on-minnesota-land-give-more-power-china.

[2] Daniella Genovese, "Gas Stoves: Trade Group 'Concerned' Over Energy Department's Proposal on Cooking Appliances," FOX Business, February 3, 2023, https://www.foxbusiness.com/lifestyle/gas-stoves-trade-group-very-concerned-over-energy-departments-proposal-on-cooking-appliances.

[3] Kenneth Artz, "Biden Administration Creating a New Bureaucracy to Develop a National Electric Vehicle Charging Network," Heartland Daily News, January 17, 2022, https://heartlanddailynews.com/2022/01/biden-administration-creating-a-new-bureaucracy-to-develop-a-national-electric-vehicle-charging-network/.

[4] Larry S. Luton, "Administrative "Interpretation" as Policy-Making: An Abuse of Discretion by Presidential Administrations," *Administrative Theory & Praxis* 31, no. 4 (2014): 557, https://doi.org/10.2753/ATP1084-1806310406.

[5] Clyde Wayne Crews Jr., "The 2021 "Unconstitutionality Index": 19 Federal Rules and Regulations For Every Law Congress Passes," Forbes, February 2, 2021, https://www.forbes.com/sites/waynecrews/2021/02/02/the-2021-unconstitutionality-index-19-federal-rules-and-regulations-for-every-law-congress-passes/?sh=dc1c4405522f.

[6] "Declaration of Independence: A Transcription," National Archives, https://www.archives.gov/founding-docs/declaration-transcript.

[7] "Constitution Annotated: Analysis and Interpretation of the U.S. Constitution," Congress.gov, https://constitution.congress.gov/constitution/.

commerce, borrowing money, declaring war, raising armed forces, and making all laws which may be deemed necessary and proper for executing their stated powers.[8] The Executive Branch is also vested with powers, most notably to enforce the laws passed by Congress and appoint individuals to public offices.[9] The final branch of government that the Founders established in the U.S. Constitution was the judiciary, per Article III, Section II.[10] The founders vested judicial power in a Supreme Court and in inferior courts that were to be established by Congress in the future, following the Constitution's ratification.

Judicial review, or the Court's ability to declare acts of Congress and the President unconstitutional, was first explained in Alexander Hamilton's *Federalist 78*. Hamilton wrote, "[courts] ought to regulate their decisions by the fundamental laws, rather than those which are not fundamental."[11] The essence of this argument is that any irreconcilable differences between laws passed by Congress and the Constitution itself shall be decided in favor of protecting the Constitution as the supreme law of the land.[12]

The power of judicial review was initially demonstrated by the Court's 1803 decision in *Marbury v. Madison*, a case commonly known for establishing a clear judicial philosophy behind the Court's primary function.[13] In this case, William Marbury, who had previously been appointed by former President John Adams as Justice of the Peace, came before the Court in hopes of receiving his commission to public office.[14] However, the Court found that the Judiciary Act of 1789, which allowed the Court to deliver the commission through a writ of mandamus, was unconstitutional and therefore void.[15] Chief Justice John Marshall famously penned, "If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[16] The essence of Marshall's ruling was that the Court may either affirm or deny the constitutionality of laws passed by Congress or actions of the President as part of their assigned duty to adjudicate disputes of law, as the Constitution is recognized as the highest law in the land. Through judicial review, the Court reinforces the American constitutional system envisioned by the Founders by checking the power of other branches.

The Beginning of American Bureaucracy

Bureaucracies have held an honored place in governments from ancient Babylon, Greece, and Egypt.[17] Thus, when the American democratic experiment began with the Articles of Confederation, bureaucracy had a place in its design.[18] The Articles' architects established federal

[8] US Constitution, art. 1, sec. 8.

[9] US Constitution, art. 2, sec. 1

[10] US Constitution, art. 3, sec. 2

[11] "The Federalist NO. 78 [28 May 1788]," Founders Online, 1788, https://founders.archives.gov/documents/Hamilton/01-04-02-0241.

[12] Ibid.

[13] *Marbury v. Madison*, 5 US 137 (1803), 138.

[14] "William Marbury v. James Madison, Secretary of State of the United States," Cornell Legal Information Institute, https://www.law.cornell.edu/supremecourt/text/5/137.

[15] *Marbury*, 171.

[16] Ibid, 178.

[17] Mohamad G. Alkadry, "Bureaucracy: Weber's or Hammurabi's? Ideal or Ancient?," *Public Administration Quarterly* 26, no. 3 (2003): 319, https://www.jstor.org/stable/41288176.

[18] "Articles of Confederation (1777)," National Archives, https://www.archives.gov/milestone-documents/articles-of-confederation.

departments to handle money, regulate foreign affairs, and conduct military matters.[19] Although the Articles' government and its preliminary authoritative document ultimately failed, the United States Constitution retained its use of the bureaucracy.

Per Article II, Section II, the U.S. Constitution created an Executive Branch that delegated authority to a president who appoints individuals to public offices and may also appoint inferior officers if Congress delegates that duty.[20] Further mention of the President's ability to appoint department heads, colloquially coined his "cabinet," can be found in Article II Section II's provision for the "require[ment of] the Opinion, in writing, of the principal Officer in each of the executive Departments."[21] During President George Washington's eight-year administration, the Departments of Defense, State, Treasury, and Justice were formed and established the bureaucracy that grew to include fifteen departments by 2023.[22]

Although bureaucracies and their practices may not be familiar to many Americans, the American bureaucracy has expanded to address nearly every issue of public life. This expansion is primarily due to three distinguishable events. President Andrew Jackson's administration, the Progressive Era, and Franklin Delano Roosevelt's New Deal all significantly contributed to the rise of the American bureaucratic state. These events, in conjunction with opinions issued by the Supreme Court regarding bureaucratic power, further perpetuated administrative overreach in ways that America's Founding Fathers never intended. By designing a system of limited government between three branches, the Founders undeniably expressed the need for internal limitations on federal authority.[23] *Federalist 48* encapsulates the principle of each branch exercising its assigned powers and the importance of constitutional safeguards in precisely marking the boundaries of each branch's jurisdiction.[24] In violation of these safeguards, bureaucratic agencies issue regulations that infringe on Congress' distinct legislative function by forcing agency-designed counterfeit legislation on the American people.[25]

When limits intentionally placed on agencies are blatantly ignored, congressional intent is not considered, and clear statutory terms are disregarded, the unrestricted exercise of administrative and executive power pose a threat to the American republic's intended design.[26]

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[19] National Archives, "Articles of Confederation (1777)."

[20] US Constitution, art. 2, sec. 2.

[21] Ibid.

[22] "Federal Judiciary Act (1789)," National Archives, https://www.archives.gov/milestone-documents/federal-judiciary-act.; "Congress Establishes the State Department, July 27, 1789," POLITICO, https://www.politico.com/story/2017/07/27/congress-establishes-the-state-department-july-27-1789-240863.; "Act of Congress Establishing the Treasury Department," U.S. Department of the Treasury, https://home.treasury.gov/history/act-of-congress-establishing-the-treasury-department. "An Act to Establish an Executive Department to be Denominated the Department of War. [Dated] 1789, June 27. New York, Printed by Thomas Greenleaf [1789]," Library of Congress, https://www.loc.gov/item/rbpe.1110160n/; "A-Z index of U.S. government departments and agencies," Usa.gov, https://www.usa.gov/agency-index.

[23] "Federalist Papers No. 51 (1788)." Bill of Rights Institute, https://billofrightsinstitute.org/primary-sources/federalist-no-51.

[24] "The Federalist NO. 48 [1 February 1788]," Founders Online, 1788, https://founders.archives.gov/documents/Madison/01-10-02-0269.

[25] Clinton, Joshua D., et al. "Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress," *Midwest Political Science Association* 56, no. 2 (April 2012): 341, https://www.jstor.org/stable/23187104.

[26] Luton, "Administrative "Interpretation" as Policy-Making," 558.

President Andrew Jackson and the Spoils System (1829-1837)

While President Andrew Jackson, the seventh President of the United States from 1829 to 1837, held a reputation as a champion of the "common people," he enforced a spoils system for appointing political actors from a pool of wealthy constituents who supported him during his presidential campaign.[27] A characteristically stubborn president, Jackson's actions often trended towards increasing government functions with disregard for their future repercussions. Upon Jackson's refusal to recharter a second bank of the United States, the bank's function as the federal fiscal agent became absorbed into the government itself.[28] In addition to government oversight of federal monetary policy, Jackson also contributed to a substantial increase in executive departments. Through the Patent Reform Act of 1836, the office of Commissioner of Patents was created.[29] Jackson also reorganized the Land and Post Offices, transferred duties from department to department, and set an important precedent for executive power and government expansion at presidential request in ways the Founders had never envisioned, leading to a quadrupling of federal expenditures while he was in office.[30]

The Progressive Era (1890-1920)

Perhaps a more striking example of government growth can be seen during the Progressive Era in the United States between 1890-1920. The contrast of lavish lifestyles enjoyed by corporate players such as steel titan Andrew Carnegie and oil executive John D. Rockefeller to the substandard tenement housing of the impoverished prompted calls for government regulation of large corporations.[31] The beginnings of the bloated and unaccountable American regulatory state that exists today can be traced to the Progressive Era, when unprecedented constitutional critiques caused a reimagining of the reasonable scope of government power.[32]

Initial congressional responses to calls for reform included legislation such as the Sherman Anti-Trust Act of 1890, an act that was designed to curb corporate monopolies. This act and others such as the Interstate Commerce Act of 1887 established new departments to complement the legal barriers congressional legislation posed to large corporations.[33] These laws, and the corresponding departments they created, such as the Interstate Commerce Commission (ICC), often proved ineffective at achieving progressive aims. The ICC was controlled by retired railroad executives with considerable interest in protecting their former business partners, and the Hepburn Act further empowered the railroad executives in control of the ICC by allowing them to set maximum freight

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[27] David Emory Shi and George Brown Tindall, *America: A Narrative History* (New York: W.W. Norton & Company, 2016), 337.

[28] Ibid, 371.

[29] Nard, Craig Allen. "Legal Forms and the Common Law of Patents," *Boston University Law Review* 90, no. 1 (February 2010): 70, https: heinonline.org/HOL/Page?lname&public=fale&collection=journals&handle =hein.journals/bulr90&men_hide=false&men_tab=toc&kind=&page=51.

[30] Shi and Tindall, *America*, 379.

[31] Lough, Alexandra W. "Editor's Introduction: The Politics of Urban Reform in the Gilded Age and Progressive Era, 1870-1920," *The American Journal of Economics and Sociology* 75, no. 1 (2016): 8, https://onlinelibrary.wiley.com/doi/full/10.11111/ajes.12139.

[32] Andrea Scoseria Katz, "The Lost Promise of Progressive Formalism," *Texas Law Review* 99, no. 4 (2021): 679, 681, https://go.openathens.net/redirector/liberty.edu?url=https://www.proquest.com/scholarly-journals/lost-promise-progressive-formalism/docview/2506600180/se-2?accountid=12085.

[33] "Interstate Commerce Act (1887)." National Archives, https://www.archives.gov/milestone-documents/interstate-commerce-act.

rates for the railroad industry.[34] In short, "government agencies responsible for regulating businesses often came under the influence of those they were supposed to regulate."[35]

President Theodore Roosevelt's Square Deal programs were also implemented to further control corporations. In 1902, a coal strike prompted Roosevelt to propose a negotiation between labor union leaders and coal executives to resolve the recent price spikes in coal. He threatened to declare a national emergency, arguing, "To hell with the Constitution when the people want coal!"[36] Roosevelt's comment serves as a prognostic indicator of the ideological paradigm often subscribed to by presidents that have supported increases in the federal government's purview.

Another indicator of the Progressive Era's shift towards larger government can be seen in the 1912 presidential candidates: Republican William Howard Taft, Democrat Woodrow Wilson, Progressive Theodore Roosevelt, and Socialist Eugene V. Debs. All of the candidates unanimously supported the idea that government intervention was necessary to solve modern social problems, indicating that government should act as a panacea for all societal ills.[37] The victor, Wilson, proposed a plan dubbed the "New Freedom" with the sole purpose of stimulating economic competition through the elimination of trusts rather than mere regulation.[38] The Progressive Era marks the turn "en masse" of people looking to government for solutions in hopes of remedying various social, economic, and industrial problems.[39] Reform efforts and government expansion birthed a "new constitutional philosophy to allow the federal government to take on vast, regulatory powers" that was further capitalized on by succeeding presidents.[40]

President Franklin Delano Roosevelt and the New Deal (1933-1945)

Economist Henry Hazlitt's argument that there is no more persistent and influential faith in the world today than the faith in government spending can be clearly seen in president Franklin Delano Roosevelt's (FDR) administration.[41] While Andrew Jackson's spoils system and Progressive Era reform catapulted government expansion by drastically increasing the size of the federal bureaucracy, FDR's New Deal is arguably the most significant contributing factor to the big government of America today.[42] FDR believed it was his prerogative as chief executive to use any powers at his disposal for the furthering of his political agenda, and his initiatives "brought government into every corner of American life."[43]

Throughout the 1930s, average unemployment soared to seventeen percent.[44] Roosevelt often attempted to counter such high unemployment rates with the synthetic government creation

[34] Shi and Tindall, *America*, 797.
[35] Ibid, 789.
[36] Ibid, 796.
[37] Ibid, 805.
[38] Ibid, 806.
[39] Katz, "The Lost Promise," 679.
[40] Ibid.
[41] Henry Hazlitt, *Economics in One Lesson* (New York: Crown Publishing Group, 1946), 31.
[42] Hugh Rockoff, "By Way of Analogy: The Expansion of the Federal Government in the 1930s," in *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century,* ed. Michael D. Bordo, Claudia Goldin, and Eugene N. White (Chicago: University of Chicago Press, 1998), 125.
[43] "FDR's Government: The Roots of Today's Federal Bureaucracy," The Washington Post, April 12, 1995, https://www.washingtonpost.com/archive/politics/1995/04/12/fdrs-government-the-roots-of-todays-federal-bureaucracy/c3091bd5-3971-4e28-9a4e-53ea3aea654f/.
[44] David M. Kennedy, "What the New Deal Did," *Political Science Quarterly* 124, no. 2, (2009); 252, https://www.jstor.org/stable/25655654.

of jobs through agencies such as the Public Works Administration, Tennessee Valley Authority, Federal Civil Works Administration, Works Progress Administration, and various others.[45] However, these initiatives often prompted ineffective federal spending which increased the number of bureaucrats involved in directing mass government expenditures and the volume of departments necessary for government action in nearly every aspect of American life.[46]

Shortly after FDR's death, Congress passed the Administrative Procedure Act (APA) of 1946 to delineate the procedure of administrative law and establish clear constitutional and statutory parameters that government agencies are bound to.[47] Decades later, this Act is still considered the most important source for federal administrative law. Through this Act, nearly all the bureaucratic state's authority comes from Congress, with the general rule that Congress makes major policy decisions while delegating authority to administrative departments to fill in any gaps in legislation.[48] Despite the procedural intentions and clear delineation of power found in the APA, Congress continues to sit idly by as bureaucratic agencies usurp authority that was never delegated to them.

The *Chevron* Decision

The most frequently referred to case of judicial deference to the bureaucracy was established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[49] This case arose through the Environmental Protection Agency's (EPA) attempts at defining the term "stationary source" from the Clean Air Act as an entire energy plant.[50] The Supreme Court decided that the statutory ambiguity left by Congress in the Act justified the EPA's power to define what constituted a stationary source, setting a dangerous precedent of bureaucratic deference.[51]

Chevron imposes a two-part test when determining if executive agencies will be deferred to regarding statutory interpretation. The first requirement holds that Congress must directly speak to the issue in dispute, and that if Congress has clearly expressed its intent in a law, then both courts and agencies are bound to Congress' intention.[52] The second requirement is that the agency's interpretation is reasonable with consideration to previous statutes and both congressional as well as judicial precedents.[53] *Chevron* was decided in contradiction of the Administrative Procedure Act which directed that the "reviewing court shall decide all relevant question of law, [and] interpret … statutory provisions."[54] The *Chevron* court justified their ruling by reasoning that American bureaucrats lack direct accountability to the American people, but the President does not; therefore, the repercussions of bureaucratic decisions fall upon the highest

[45] "FDR's Government."

[46] Rockoff, "By Way of Analogy," 131.

[47] "Administrative Procedure Act," National Archives, https://www.archives.gov/federal-register/laws/administrative-procedure/551.html.

[48] Luton, "Administrative "Interpretation" as Policy-Making," 557.

[49] Bernhardt, David L, *You Report to Me: Accountability for the Failing Administrative State* (New York, NY: Encounter Books, 2023), 107.

[50] *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc*., 467 US 837 (1984), 859-860.

[51] Ibid, 835-837.

[52] Cass R. Sunstein, "Chevron Step Zero," *Virginia Law Review* 92, no. 2 (2006): 190, https://www.jstor.org/stable/4144979.

[53] Ibid, 191.

[54] Sunstein, "Chevron Step-Zero," 196.

office holder in the nation and attach a condition which may mitigate executive departments' overreach.[55]

The Court also concluded that Congress intended for agencies, rather than judicial institutions, to enact the necessary policy decisions when statutory ambiguities occurred, or otherwise circumvented its own legal authority to executive actors in control of administrative agencies.[56] Despite an attempt at rationalizing deference to administrative agencies, the Court merely offered a weak line of reasoning that is ineffective at preventing the bureaucracy from trampling on American's rights and constitutional principles in the name of advancing their own agendas. The Court's ruling in *Chevron* has perpetuated the idea that "[i]n the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is."[57] As a result, *Chevron* has become the foundation for all allocation of power between the federal judiciary and executive departments.

In 2005, the Court heard *National Cable & Telecommunications Association v. Brand X Internet Services* on appeal from the 9th Circuit Court of Appeals in San Francisco, California, which further clarified *Chevron*'s purview.[58] The 9th Circuit referred to a string of cases decided by the Supreme Court in the 1990s which indicated that previously decided rulings regarding statutory ambiguities were binding on executive agencies based on the principle of *stare decisis.*[59] However, the Court found that the 9th Circuit had elevated *stare decisis* above *Chevron* deference, of which the core idea is that agencies, rather than courts, are allowed to determine statutory or textual ambiguities not explicitly or clearly defined in the legislation itself.[60] Reversing the 9th Circuit Court's decision, the Supreme Court established that any judicial construction of ambiguity in an agency-administered statute is not authoritative, and therefore agencies have license to override the court's ruling.[61] In place of the court's interpretation, agencies may enforce a contradictory implementation through a rulemaking proceeding if the judicial decision was not made on the basis of the statute's clearly articulated text.[62] Notably, the late Justice Scalia's dissent in this case characterized "the Court's new rule as a bizarre and likely unconstitutional transfer of power from courts to agencies."[63] In *Brand X*, the Supreme Court further reaffirmed bureaucratic ability to disregard judicial interpretation(s) of statutes in favor of adopting one(s) that would further an agency's political agenda.[64]

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[55] Sunstein, "Chevron Step-Zero," 241-242.

[56] Richard W. Murphy, "A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom," *Administrative Law Review* 56, no. 1 (2004): 13, https://www.jstor.org/stable/40712163.

[57] Sunstein, "Chevron Step Zero," 189.

[58] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 US 967 (2005).

[59] *Brand X*, 984.

[60] Ibid, 985.

[61] Ibid.

[62] Ibid, 983.

[63] Kathryn A. Watts, "Adapting to Administrative Law's *Erie* Doctrine," *Northwestern University Law Review* 101, no. 3 (2007): 1000. https://go.openathens.net/redirector/liberty.edu?url=https://www.proquest.com/scholarly-journals/adapting-administrative-laws-erie-doctrine/docview/233344243/se-2?accountid=12085.

[64] Ibid, 999.

Other Levels of Deference: *Skidmore* and *Auer*

Prior to the *Chevron* decision, several cases that the Supreme Court ruled on in the years preceding *Chevron* indicated the judiciary's growing favor of executive agencies. In 1944, *Skidmore v. Swift & Co*. was argued before the Court, rising out of a claim brought by employees seeking overtime pay under the Fair Labor Standards Act.[65] The Court found that Congress had failed to determine the scope of which cases qualified to fall within the Act; thus, it was the role of the courts to settle the dispute of whether the employees' time spent on-call qualified as work time and entitled them to compensation.[66] Congress also created an administrative office to investigate violations of the Act and develop expertise which would trump that of the courts.[67] The Court subsequently developed a philosophy of respecting the opinions adopted by the administrator while not binding itself to any bureaucratic perspectives. This case established what is known as the third level of administrative deference, directing that courts do not unilaterally refer to an agency's interpretation of a statute, but rather that they give varying deference with consideration to the agency's expertise on the individual matter in question.[68] Rather than a broad delegation of authority from the courts to executive agencies, *Skidmore* proposes a philosophy of judicial interpretations that consider agency opinions on subject matters which may call for bureaucratic expertise while not restricting the courts to universally refer to such opinions.[69] Agency views, even those that are not binding on the courts, may still "constitute a body of experience … to which courts and litigants may properly resort for guidance."[70] Thus, *Skidmore* acts as the catch-all for agencies that do not qualify for the *Chevron* standard and "tells courts that they are in charge of statutory interpretation but must pay careful attention to the views of agencies that possess relevant expertise to share."[71]

Another tier of deference was established in *Auer v. Robbins* in 1997.[72] In this case, employees at the St. Louis Police Department sought overtime pay under the Fair Labor Standards Act of 1938 which prevented public sector employees from receiving such compensation.[73] The Court was asked to determine whether the Secretary of Labor's test in determining an employee's ability to obtain overtime pay reflected a clear reading of the statute.[74] In *Auer*, the Court referred to *Chevron's* reasoning to determine that the Secretary's actions were permitted because Congress had not spoken specifically to the issue at hand, and the test set for determining employees' overtime pay qualifications was not unreasonable based on the statute in question.[75] In essence, *Auer* directs that the courts defer to how each agency interprets its own vague regulations unless they are clearly inconsistent with the regulation itself, or in clear violation of the statute(s) being interpreted.

[65] *Skidmore v. Swift & Co*., 323 US 134 (1944), 134.
[66] Murphy, "A New Counter-Marbury," 21.
[67] "Wage and Hour Division," U.S. Department of Labor, https://www.dol.gov/agencies/whd.
[68] Murphy, "A New Counter-Marbury," 7.
[69] Ibid, 8.
[70] *Skidmore*, 140.
[71] Murphy, "A New Counter-Marbury," 22.
[72] *Auer v. Robbins*, 519 US 452 (1997).
[73] Ibid, 454.
[74] Ibid.
[75] Ibid, 458.

Tempering Agency Discretion in *Maislin, Lenchmere,* and *Neal*

Despite the Supreme Court's blatant and unconstitutional delegation of power to executive agencies in interpreting and applying laws passed by Congress, a string of decisions decided in the 1990s served to ease the tension between *stare decisis* and agency statutory interpretation. The first of these cases was *Maislin Industries, U.S. Inc. v. Primary Steel, Inc*. in 1990.[76] This case presented the Court with a series of regulations recently established by the Interstate Commerce Commission, which the Court found conflicted with previous judicial rulings and were thus prohibited.[77] The Court explained its reasoning for this decision on the grounds of stare decisis, judging "an agency's later interpretation of the statute against [the Court's] prior determination of the statute's meaning."[78]

The second case was *Lenchmere, Inc. v. National Labor Relations Board* in 1992. In this case, the Court referred to its previously established precedent in *Maislin* of the superiority of judicial interpretations over agency perspectives when a court determined the statutory ambiguity first.[79] Applying this principle, the Court held that interpretation of a statute decided by the National Labor Relations Board after the Court had already clearly interpreted it would not be allowed to contradict the previous judicial decision.[80]

The last of these cases was *Neal v. United States* in 1996. The United States Sentencing Commission's interpretation of a statute did not receive deference from the Court as it was in opposition to the Court's previous conclusion of what that statute required.[81] This case also omitted the "clear" standard required of *Maislin* and *Lenchmere* in that a court's statutory interpretation takes priority over an independent agency's interpretation under the doctrine of *stare decisis*, even if that agency qualifies for *Chevron* deference.[82] The Court is therefore no longer required to necessarily determine anything unclear in the statute, but simply analyze what the statute requires. In *Maislin*, *Lenchmere*, and *Neal*, the Court proposed the superiority and necessity of judicial statutory interpretation on the grounds of *stare decisis*, subtly weakening the foundation upon which *Chevron* stands.

Navigating Deference Between the Branches of Government

The precedent set by the Supreme Court in *Chevron* has allowed bureaucrats to usurp rulemaking authority that instead belongs to the people's elected representatives. Decades of judicial deference to executive actors for statutory interpretation have eroded the Founding Fathers' design of separation of powers between the federal government's branches. To restore a system where checks and balances are respected, each branch of government must exercise its constitutional authority. Congress should scrupulously define statutory terms and emphasize discretionary budgeting to avoid excess government spending by executive actors, the Supreme Court must prevent administrative agencies from weaponizing their discretionary authority to overreach into the lives of American citizens, and the President needs to assume his

[76] *Maislin Industries, U.S. v. Primary Steel*, 497 US 116 (1990).
[77] Ibid, 140.
[78] Ibid, 131.
[79] Watts, "Adapting to Administrative Law's," 1010.
[80] Ibid.
[81] *Neal v. United States*, 516 US 284 (1996).
[82] Watts, "Adapting to Administrative Law's," 1010.

responsibility of directly supervising agency leaders. If each branch returns to these constitutional duties, administrative encroachment can drastically decrease.

The Legislative Branch

Chevron deference was only designed to apply in limited situations where the authority delegated is restricted, statutory ambiguities are clearly present, Congress has not explicitly spoken to the matter at hand, and a judicial decision on the subject has not already been previously decided in a separate case.[83] However, bureaucratic agencies have consistently pushed *Chevron* to its limits.

The Congressional response to bureaucratic overreach is not merely that Congress should take a more active role in overseeing regulatory lawmaking. Rather than, in the words of Nancy Pelosi, former Speaker of the U.S. House of Representatives, "pass[ing bills] so that you can find out what is in it," the legislature must regularly carry out its intended function of passing concise laws that explicitly define terms when necessary in order to prevent the ambiguity that has led to bureaucratic power grabs.[84] Moving forward, Congress needs to utilize the full scope of tools at its disposal to adequately oversee the gargantuan bureaucracy that has largely overtaken American legislative function in recent years on a practical level.

A primary function Congress also possesses is the power to pass appropriations bills and annual budgets for each federal agency which can prompt agency cooperation with Congressional intentions.[85] However, this power has a gaping wound that is yet to be cauterized: a substantial increase in mandatory rather than discretionary spending, which allows agencies to spend money that does not have to be annually appropriated. In 2016, 69% of the federal budget went towards mandatory spending.[86] Congress must emphasize discretionary spending to regain supervision of taxpayer dollars. In abdication of these duties, Congress risks promoting further growth of the administrative state in the twenty-first century.

The Judicial Branch

Under the American system of limited government, an agency cannot announce actions that bind citizens and the courts, unless Congress has delegated to it the authority to do so.[87] Courts must ask whether the agency has the authority to regulate on specific subject matter and determine if Congress authorized the agency's rulemaking authority in the specific format chosen, such as through amicus briefs, opinion letters, policy statements, regulations, and other forms of bureaucratic rulemaking.[88] Through acceptance of agency perspectives, courts may allow agencies to bypass procedural formalities and safeguards such as notice-and-comment rulemaking that prevent arbitrary bureaucratic power grabs.

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[83] Luton, "Administrative "Interpretation as Policy-Making," 558.

[84] Nancy Pelosi, "Pelosi: 'We have to pass the bill so that you can find out what is in it," House Republicans, March 10, 2010, YouTube video, 0:05, https://www.youtube.com/watch?v=9uC4bXmcUvw.

[85] US Constitution, art. 1, sec. 2,

[86] Walker, "Restoring Congress' Role," 1108.

[87] Robert A. Anthony, "Which Agency Interpretations Should Bind Citizens and the Courts?," *Yale Journal on Regulation* 7, no. 1 (1990): 5, https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/yjor7&men.

[88] Anthony, "Which Agency Interpretations," 5.

In both *Christensen v. Harris County* and *United States v. Mead Corp*, the Court significantly narrowed *Chevron*'s applicability in clarifying that the *Chevron* standard only applies under two conditions.[89] First, Congress must have delegated power to the specific agency to act with the force of law, binding those outside of the agency, including the courts, to its statutory interpretation.[90] Second, the agency department is required to legitimate its delegated authority in the matter at issue.[91] In *Mead*, the Supreme Court aggressively narrowed the ability for executive agencies' statutory interpretations to be granted deference under *Chevron* and clarified that the mere presence of ambiguous language in a statute is not sufficient cause for the application of *Chevron* deference.[92]

Perhaps the most influential case in the last ten years concerning the limitations of bureaucratic overreach is *West Virginia v. Environmental Protection Agency* which was decided by the Supreme Court in 2022.[93] Under Section 111 of the Clean Air Act, the Environmental Protection Agency (EPA) claimed the authority to issue rules and performance standards of power plants regarding greenhouse gas emissions and other pollutants.[94] Pursuant to this claim, the EPA issued a rule in 2015 determining that reducing emissions from coal-fired plants demanded that those facilities must "reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources."[95] In this case, the Supreme Court was asked to consider whether congressional delegation to the EPA in the Clean Air Act (CAA) included a broad new interpretation which imposed new regulations on coal plants.

The Act created three programs for limiting air pollution from stationary sources.[96] In 2015, the EPA attempted to use its broad discretionary authority, with specific reference to Section 111(b) and (d) of the CAA, to justify new restrictions on coal power plants in the United States.[97] To meet the EPA's new cumbersome regulations, coal plants would need to either reduce electricity production, establish a new plant powered by natural methods such as wind and solar, or purchase emissions allowances.[98] The EPA's goal in establishing these new emissions ceilings was to catalyze a shift from coal and natural gas to wind and solar as the primary sources of American energy.

In 2019, the EPA repealed the rule in recognition of its overreach and its categorization under the major questions doctrine. This doctrine requires Congress to indisputably indicate its desires to grant agencies the ability to make regulatory decisions that may have far-reaching political and economic repercussions.[99] This doctrine developed through agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.

In place of the Clean Power Plan, the EPA adopted the Affordable Clean Energy (ACE) rule. West Virginia, North Dakota, and various energy companies filed petitions in the D.C. Circuit to oppose the ACE rule.[100] The Court of Appeals did not find the EPA's proposed actions to qualify

[89] *Christensen v. Harris County*, 529 US 576 (2000). *United States v. Mead Corp*, 533 US 218 (2001).
[90] Ibid.
[91] Ibid.
[92] Murphy, "A "New" Counter-Marbury," 3, 17.
[93] *West Virginia Et Al. v. Environmental Protection Agency Et Al.* 597 S. Ct. (2022), 2.
[94] "Clean Air Act Overview," United States Environmental Protection Agency, https://www.epa.gov/clean-air-act-overview/clean-air-act-text.
[95] *West Virginia*, 2.
[96] Ibid.
[97] Ibid, 28.
[98] Ibid, 8.
[99] Ibid, 11.
[100] Ibid, 1.

for the major questions doctrine, thus not demanding specific congressional delegation of power to the EPA to justify their proposed use of Section 111. The Court remanded to the EPA for further consideration of its rules, and the original petitioners filed for certiorari which was granted by the Supreme Court in 2021.[101] The Court found that the EPA overstepped the boundaries of its congressionally delegated authority in weaponizing Section 111 of the Clean Air Act to propose a fundamental shift in the American power system when the Agency was not authorized to operate on such a fraudulent basis.[102] Chief Justice Roberts opined, "There is little reason to think Congress assigned such decisions to the Agency."[103]

The Court further rationalized that the EPA had no authoritative basis in issuing such cataclysmic regulations, noting that "Congress … has consistently rejected proposals to amend the Clean Air Act to create such a program."[104] According to the Court, "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[105] If the people's elected representatives neglected to pass legislation aimed at achieving the same emissions-curbing goals of the EPA, the Agency, with little oversight or accountability, should not be authorized to do so.[106] *West Virginia v. EPA* thus potentially marks a fundamental shift in the Court's deference to administrative agencies in matters of statutory interpretation.[107] In limiting the boundaries of administrative agencies, the Court restores the importance of American voters in a government that is supposed to represent them. Without the courts to hold bureaucrats accountable, elected officials lose their ability to accurately represent the American people when competing with a myriad of government agencies each aimed at furthering their own agendas at the layman's expense. The Court must take a more active role in restraining the ability of bureaucrats to exercise power that was never delegated to them.

The Executive Branch

Executive Branch attempts within agencies to expand government power are abuses of administrative discretion and threaten the legitimacy of the American constitutional system. Illegitimate strategies that alter policy implementation while circumventing Congress undermine the validity of policy intent. To ensure longevity, policies must have a basis in the established legislative processes.[108] A system of separated powers and checks and balances on each branch of government not only carries out the Founding Fathers' hard-won dream of a new nation "conceived in liberty," but also protects the American people from ambitious unelected officials who may seek to further policy agendas rather than represent American citizens.[109]

President Donald Trump's approach to deregulatory efforts during his four years in office was described as "fundamentally freeing" by his Secretary of the Interior, David Bernhardt, and aimed to diminish harmful bureaucratic power while restoring a system of executive supervision

[101] *West Virginia*, 11.
[102] Ibid, 24.
[103] Ibid, 25.
[104] Ibid, 27.
[105] Ibid.
[106] Ibid, 31.
[107] Bernhardt, *You Report to Me*, 108.
[108] Luton, "Administrative "Interpretation" as Policy-Making," 572.
[109] "The Gettysburg Address," Cornell University, https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm.

over administrative agencies.[110] In 2014, the EPA threatened to fine a family twenty million dollars for establishing a pond on their property for their farm animals and imprisoned and fined a United States Navy veteran after determining that ponds he had created qualified for federally protected navigable waters.[111] President Trump found these actions in clear violation of the government's authority and required federal agencies to publish documents on easily searchable websites to allow all Americans better access to federal rules and regulations.[112] His administration also slashed eight and a half regulations per each new one, far exceeding his promise to cut two regulations for each new one.[113] Presidential actions such as these can help restore the limited role that the bureaucracy should play in the American government.

Conclusion

The United States' Founding Fathers gifted Americans with a carefully crafted blueprint to create what has become the most successful constitutional republic in modern history. The United States features a precise constitutional design, clearly divided branches of government, and a powerful separation of powers doctrine. However, decades of unmitigated bureaucratic gluttony have culminated in an environment where Americans are largely governed by unelected agency leaders with unchecked power to regulate every facet of public life without consequence. This paper focused on a historical narrative of expanding bureaucratic power and the Supreme Court's indispensable role in preventing the devastating overreach of bloated American bureaucratic agencies. The Court's history in administrative law has been demonstrated by *Skidmore, Chevron, Maislin*, *Lenchmere*, *Neal*, and *Auer*, with the judicial pendulum recently swinging towards much-needed narrowing of agency power in *West Virginia*. Now more than ever, the Supreme Court must prevent unelected officials from wielding unconstitutional authority. The Court must instead preserve representative democracy by limiting bureaucratic imbalances of power and providing the necessary space for elected officials to perform constitutional duties in a substantive way. The American republic hangs in the balance.

[110] Bernhardt, *You Report to Me*, 116.

[111] "President Trump's Historic Deregulation is Benefitting All Americans," Fact Sheets, Trump White House Archives, October 21, 2019, https://trumpwhitehouse.archives.gov/briefings-statements/president-trumps-historic-deregulation-benefitting-americans/.

[112] Tristan Justice, "Trump Issues Executive Orders to Somewhat Restrain Federal Bureaucracy," The Federalist, October 19, 2019, https://thefederalist.com/2019/10/10/trump-issues-executive-orders-to-somewhat-restrain-federal-bureaucracy/.

[113] Lydia Wheeler and Lisa Hagen, "Trump Signs '2-for-1' Order to Reduce Regulations," The Hill, January 30, 2017, https://thehill.com/homenews/administration/316839-trump-to-sign-order-reducing-regulations/.

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