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Is the U.S. Supreme Court Becoming Hostile to the Administrative State

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Is the U.S. Supreme Court Becoming Hostile to the Administrative State?

By Jeffrey S. Lubbers*

The U.S. Constitution's Separation-of-Powers doctrine is based on that document's vesting of legislative, executive and judicial powers solely in those three respective branches. Although Article I, Section 8's list of subjects of legislative power implies the need for executive agencies to collect taxes and customs duties, regulate commerce, coin money, establish post offices, provide for patents and copyrights, regulate government lands, and maintain armies, such agencies are barely alluded to, with only three undefined references to "departments," one in the Necessary-and-Proper Clause of that Section,¹ and two in Article II's only two clauses devoted to the organization of the executive branch—the Appointments Clause² and the Report Clause.³

However, the first Congress created several departments⁴ and delegated authority to the President to pay pensions "to the invalids who were wounded and disabled during the late war . . . under such regulations as the President of the United States may direct."⁵ Still though, the Executive Branch was quite small before the Civil War,⁶ and even at the end of the Nineteenth

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¹ "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States or in and Department or Officer thereof."

² U.S. CONST. art. II, § 2, cl. 2.

³ U.S. CONST. art. II, § 2, cl. 1. Note that the term "principal officers of the executive departments" is also mentioned in the XXV Amendment, § 4.

⁴ In 1800, there were only three Departments (State, War, and Treasury). The offices of Attorney General and Postmaster General were also created, but their departments were created much later. Wikipedia—Executive Departments.

⁵ First Congress: Act of September 29, 1789.

⁶ Before the Civil War, in addition to the offices mentioned in note 4, the Department of the Interior had been created in 1849 absorbing the General Land Office, which existed as a free-standing agency from 1812-1849. Other agencies included the Board of Supervising Inspectors (created in 1852 to regulate steamboat safety); the U.S. Mint,

Century only comprised eight departments⁷ and several free-standing agencies, notably the Civil Service Commission created by the Pendleton Act of 1883,⁸ the Interstate Commerce Commission (ICC), created by the Interstate Commerce Act of 1887—the first independent regulatory agency whose members could only be removed by the President for cause.⁹

But with the advent of the Twentieth Century, the modern “Administrative State” began to emerge.¹⁰ The 1906 Hepburn Act gave the ICC rate-making authority, “making it a very powerful agency. Until this time, the agency, with little discretionary power, had been rather weak and ineffectual, but the Progressives saw the value in an entity removed from politics and promoted the independent form.”¹¹ The Department of Commerce and Labor was established in 1903 and split into separate Departments in 1913. In that latter year, President Wilson signed the Federal Reserve Act, which required all national banks to join the Federal Reserve System, which in turn was overseen by a Board of Governors.¹² In 1916, a piece of social legislation was

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which operated as a free-standing agency reporting to the President from 1799 to 1873 when it became part of the Department of the Treasury, see “timeline of the U.S. Mint, <http://www.usmint.gov/education/historianscorner/?action=timeline>, the Smithsonian Institution established in 1846; and several Congressional agencies—the Library of Congress (established in 1800), the Botanic Gardens (established in 1820) and the Government Printing Office (established in 1860). For extensive coverage of steamboat regulation see JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION—THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW*, ch. 7, 187-203 (2012).

⁷ The Departments of Agriculture, Interior, Justice, Navy, Post Office, State, Treasury and War. There was also a non-cabinet Department of Labor, created in 1888. As mentioned, later in the text, it was not given independent cabinet status until 1913. See Mashaw, *supra* note 6, at 240 and n.76.

⁸ See U.S. OFFICE OF PERSONNEL MANAGEMENT, *BIOGRAPHY OF AN IDEAL—A HISTORY OF THE FEDERAL CIVIL SERVICE 206-08* (2003), available at <http://archive.opm.gov/BiographyofAnIdeal/PDF/BiographyOfAnIdeal.pdf>.

⁹ Originally the Commission was placed in the Department of the Interior, but two years later “the Secretary’s authority over the commission was eliminated by statute and the commission became functionally independent of the executive branch.” Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1129 (2000).

¹⁰ See DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014).

¹¹ *Id.* at 1130.

¹² At first, the Secretary of the Treasury chaired the Board, but this was changed in 1935. See the Board of Governors’ home page at <http://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm>. For more on the experimentation in the Nineteenth Century with national banks, see Mashaw, *supra* note 6, at ch. 9, 156-174.

enacted creating the U.S. Employees' Compensation Commission (USEC) to administer workers' compensation benefits for civil employees of the United States suffering personal injuries while in the performance of official duties.¹³ Congress created other new free-standing regulatory agencies such as the Federal Trade Commission in 1914¹⁴ and the Federal Radio Commission in 1927,¹⁵ with very broad delegations. To address the Great Depression many new financial regulatory agencies were created,¹⁶ along with the Federal Power Commission in 1930,¹⁷ the powerful but short-lived National Recovery Administration (NRA) in 1933, the National Labor Relations Board in 1935,¹⁸ and the United States Maritime Commission in 1936.¹⁹ The Bureau of the Budget (precursor to the Office of Management and Budget) was created in 1921 to help coordinate the funding of the expanded Executive Branch.²⁰

The Office of the Comptroller of the Currency had been created within the Department of the Treasury in 1863, see *id.* at 242.

¹³ See description in the U.S. Government Organization Manual (1945), available at <http://www.ibiblio.org/hyperwar/ATO/USGM/USECC.html>. The USEC's jurisdiction was broadened in 1927 to include administration of the Longshoremen's and Harbor Workers' Compensation Act, which provided workers' compensation benefits for employees in private enterprise while engaged in maritime employment on navigable waters of the United States.

¹⁴ See the Federal Trade Commission Act, 38 Stat. 717. Section 5 contained the broad delegation that the FTC was charged with enforcing: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." (now codified at 15 U.S.C. § 45(a)(1) (2012)). For a legislative history of the Act, see Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 27 B.C. L. REV. 227 (1980).

¹⁵ See the Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, which created a Federal Radio Commission in section 3 and propounded the "public interest, convenience or necessity" standard for regulation in section 4. In 1934, the Act was superseded by the Communications Act, which replaced the Federal Radio Commission with the Federal Communications Commission. Pub. L. No. 416, June 19, 1934, 73d Cong.

¹⁶ These include the Federal Home Loan Bank Board (1932); Farm Credit Administration and Federal Deposit Insurance Corporation (1933); Securities and Exchange Commission (SEC) and Federal Credit Union Board (1934).

¹⁷ The Commission was actually created in 1920 to coordinate federal hydroelectric projects, but it was under the joint administration of the Secretary of War, Interior, and Agriculture. The version created in 1930 was a classic independent regulatory commission. In 1977 the FPC became the Federal Energy Regulatory Commission. See History of FERC, <http://www.ferc.gov/students/ferc/history.asp>.

¹⁸ National Labor Relations Act of 1935, 49 Stat. 449, codified at 29 U.S.C. §§ 151-169.

¹⁹ According to the Federal Maritime Commission's [FMC's] website:

At first, Congress and the Supreme Court showed skepticism about this growth. In 1894 the Supreme Court declared the income tax unconstitutional,²¹ a decision that was ultimately addressed in 1913 by the ratification of the Sixteenth Amendment. The Court also struck down two delegations to the NRA in 1935,²² causing it to stop operating, and Congress passed, and came close to overriding President Franklin Roosevelt's veto of, the Walter-Logan bill,²³ which would have subjected administrative agencies to formal hearings in their rulemakings and in response to petitions to revise rules, required them to use three-person panels in adjudications, and made their actions subject to extensive judicial review.²⁴

During World War II, the military agencies were expanded, and right afterwards Congress enacted the APA, which provided for procedural limits on agency action, but also implicitly recognized agency rulemaking and adjudicative power.²⁵ In the last half of the Twentieth Century, Congress created seven of the current fifteen departments and many new

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In 1920, Congress passed the Merchant Marine Act, which charged the United States Shipping Board with monitoring and responding to foreign laws, regulations, or practices that create conditions unfavorable to shipping in the foreign trade.

In 1933, President Franklin D. Roosevelt signed an executive order that transferred the United States Shipping Board's functions to the U.S. Shipping Board Bureau in the Department of Commerce. In 1936, Congress separated the Board from the Commerce Department, creating the United States Maritime Commission. . . . In 1950, the regulatory programs of the United States Maritime Commission were transferred to the Federal Maritime Board at the Department of Commerce, where they resided until the FMC's creation in 1961.

[Http://www.fmc.gov/about/history.aspx](http://www.fmc.gov/about/history.aspx).

²⁰ Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921).

²¹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehrg.*, 158 U.S. 601 (1895).

²² *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), *Panama Refining Co. v. Ryan*, 293 U.S. 388, 446 (1935).

²³ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1593-1632 (1996) (describing the legislative action on the Walter-Logan bill). The vote to override the veto in the House was 153 to 127, or 34 votes short. *Id.* at 1630.

²⁴ See PETER WOLL, *ADMINISTRATIVE LAW, THE INFORMAL PROCESS*, 18-19 (1963) (describing the bill as an "extreme attempt on the part of the legal profession to judicialize administrative procedure"). *Id.* at 19.

²⁵ See generally Shepherd, *supra* note 23.

regulatory agencies, some of which, like the Departments of Transportation and Homeland Security and the Environmental Protection Agency, have broad regulatory power.

Several key Supreme Court decisions have stimulated the growth of agency power. An early one was the 1932 decision of *Crowell v. Benson*,²⁶ which upheld Congress's ability to delegate adjudicative power to the USEC.²⁷ That was followed closely by *Humphrey's Executor v. United States* 1935,²⁸ which, in effect, recognized Congress's power to create independent agencies. After the passage of the APA, the Court enhanced the authority of agency administrative law judges (ALJs) (then called "hearing examiners") in *Universal Camera Corp. v. NLRB*²⁹ and *Butz v. Economou*.³⁰

A series of cases sharply limited the non-delegation doctrine, ruling that delegations were proper as long as the legislation passed by Congress contained an "intelligible principle" to be followed by the agency in its regulations.³¹ Occasional protests to this low bar were heard,³² but

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²⁶ 285 U.S. 22 (1932).

²⁷ In so doing, the Court distinguished cases involving matters of "public rights" in which the government and private persons were opposing parties, and matters of "private rights" where two private parties were opposed. The Court reasoned that because Congress could assign public rights disputes to itself or to executive officers, it could also assign them to administrative tribunals like the USEC. However, the USEC essentially was a referee between a private employer and employee in the Longshoreman and Harbor Workers context so that distinction did not apply. Nevertheless the Court upheld the delegation because it found that Article III courts had the power to independently review all issues of law and "questions of constitutional and jurisdictional fact." See MICHAEL ASIMOW AND RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 460-61 (4th ed. 2014).

²⁸ 295 U.S. 602 (1935).

²⁹ 340 U.S. 474 (1951) (requiring reviewing courts to consider the initial decisions of hearing examiners as part of the record in reviewing agency final orders).

³⁰ 438 U.S. 478, 513 (1977) ("There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge.").

³¹ This test actually originated in the 1928 case of *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.") Other than the two decisions involving the National Industrial Recovery Act in 1935, *supra* note 22, the Court has never struck down an Act of Congress on non-delegation grounds.

³² See *Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J. concurring in the judgment, but finding a violation of the non-delegation doctrine).

Justice Scalia seemed to have resignedly accepted it in the 2001 case of *American Trucking Associations* when the Court rebuffed an attempt by the D.C. Circuit to revive the doctrine.³³

These were important developments, but it is in the realm of scope of judicial review where the Supreme Court has really “fertilized” the growth of agency power. The pre-APA case of *Skidmore v. Swift*³⁴ held, somewhat circularly, that agency interpretations of their own statutes should be accepted by the courts where they were persuasive, depending on a series of factors. But in another case decided just before enactment of the APA, *Bowles v. Seminole Rock and Sand*,³⁵ the Court said that courts normally should defer to agency interpretations of their own regulations—a principle that was followed and reinforced in *Auer v. Robbins*³⁶ in 1997. In between those two cases, the Court propounded the famous *Chevron* doctrine, holding that courts must accept reasonable agency interpretations of ambiguous provisions of their own statutes.³⁷ Procedural review of agency actions was also limited by the Court’s decision in *Vermont Yankee*,³⁸ which held that courts should not require procedures beyond those in the APA in review of agency rulemaking. In that case Justice Rehnquist criticized the D.C. Circuit’s “Monday morning quarterbacking” of agency procedural choices.³⁹ The *Vermont Yankee*

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³³ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (“In short, we have ‘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.’”) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

³⁴ 323 U.S. 134 (1944). See also *Nat’l Labor Relations Bd. v. Hearst Publ’ns*, 322 U.S. 111, 130 (1944), decided the same year, where the Court approved an NLRB interpretation of the word “employee” saying, “where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”

³⁵ 325 U.S. 410 (1945).

³⁶ 519 U.S. 452 (1997).

³⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³⁸ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

³⁹ *Id.* at 547 (“This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.”).

doctrine was quickly extended to review of agency formal adjudications,⁴⁰ and then, oddly, even to informal adjudications.⁴¹

In another set of cases, dealing with access to judicial review, the Supreme Court, led by its conservative majority, has erected a higher bar for litigants against the government. Although in the *Abbott Labs* case, the Court in 1966 recognized a presumption of reviewability in the APA,⁴² and also allowed pre-enforcement review of rules,⁴³ later decisions on standing to sue,⁴⁴ ripeness,⁴⁵ finality,⁴⁶ and the Court's disinclination to imply private rights of action,⁴⁷ all have made it more difficult for challengers of agency action. To be sure, these cases may have been motivated by a different set of conservative principles—that disfavor federal court litigation—but they have provided effective defenses for the government in defending suits against government agencies.

All of these developments can be seen as broadly pro-agency, but there are a few parts of the administrative law doctrine that are more ambivalent or even cut the other way. Cases applying the APA's arbitrary-and-capricious test⁴⁸ have swung back and forth from the “hard

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⁴⁰ *Steadman v. SEC*, 450 U.S. 91, 104 (1981).

⁴¹ *LTV Corp. v. Pension Ben. Guar. Corp.*, 496 U.S. 633, 653–55 (1990). I say “oddly” because the APA provides little by way of procedure for informal adjudications.

⁴² *Abbott Labs. v. Gardner*, 387 U.S. 136 (1966) (“only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review”) (quoting *Rusk v. Cort*, 369 U.S. 367, 379–380 (1962)).

⁴³ *Id.* at 148–56.

⁴⁴ *See e.g.*, *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992).

⁴⁵ *See e.g.*, *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 200 (1994).

⁴⁶ *See e.g.* *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

⁴⁷ *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See also* *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015) (Supremacy Clause does not confer a private right of action to sue to enjoin unconstitutional actions by state officials carrying out federal statute).

⁴⁸ 5 U.S.C. § 706 (2)(A).

look” of *State Farm*⁴⁹ to the “soft look” of *Baltimore Gas and Electric*,⁵⁰ (decided just months apart), with a later decision, written by Justice Scalia, giving agencies the added flexibility of allowing them to change policies without being subject to a stricter form of the test.⁵¹

Overall, the great majority of the Supreme Court’s post World War II administrative law cases, until the last few years, have favored executive agency power and discretion. But this long-standing trend appears to be experiencing an undertow, at least judging by some recent opinions signed at various times by five Justices of the current Court.

Several of the above “pillars” of the Administrative State—*Auer*, *Chevron*, and the weak non-delegation doctrine—have been criticized in the last five years by several members of the Court. Even *Humphrey’s Executor* has been whittled slightly by the *Public Company Accounting Oversight Board (PCAOB)* case, where the Court balked at allowing “double for-cause” protection for members of the PCAOB.⁵² And the last major pillar, *Vermont Yankee*, while still standing and invoked in a conclusive way in this Term’s decision in *Perez v. Mortgage Bankers*,⁵³ has itself been diluted by the Court’s acceptance of several procedural norms in rulemaking not found in the APA that had already been imposed by the D.C. Circuit before *Vermont Yankee* was decided.⁵⁴

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⁴⁹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁵⁰ *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.* 462 U.S. 87 (1983).

⁵¹ See *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514 (2009) (“We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.”).

⁵² *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010) (holding that the PCAOB members’ for-cause protection, when coupled with the same protection given to its overseeing agency, the SEC, “subverts the President’s ability to ensure that the laws are faithfully executed”).

⁵³ 135 S. Ct. 1199 (2015) (holding that the D.C. Circuit’s insistence that an agency must go through notice and comment when it changes a prior interpretation of a regulation violated *Vermont Yankee*).

⁵⁴ See Peter Strauss, *Recent Developments in Administrative Law—The Tremors of March 9, 2015*, (forthcoming in this volume) __ (referring to *State Farm*’s and *Perez*’s acceptance of the requirement that agencies respond to significant public comments in the final rule preamble despite the APA’s simple prescription of a “concise” statement of basis and purpose for final rules).

The *Auer* deference doctrine was the first to come under frontal attack—ironically by the author of the unanimous opinion in *Auer*, Justice Scalia. The idea of an agency getting deference when it interpreted its own rules had been criticized by some scholars, including in a strong and apparently influential article by one of Justice Scalia’s former law clerks, John Manning.⁵⁵ He and other critics pointed out that under two post-*Chevron* cases, *Christensen*⁵⁶ and *Mead*,⁵⁷ agencies normally would only be entitled to *Skidmore* deference for interpretations of statutes propounded in rules that did not go through notice and comment such as policy statements or interpretive rules, but that if an agency issued a rule that simply parroted the statute and then issued an interpretation of that rule, they could achieve *Auer* deference. The Supreme Court responded by disallowing this in *Gonzales v. Oregon*.⁵⁸ Nevertheless, in 2011, in *Talk America v. Michigan Bell Telephone Co.*,⁵⁹ in a case in which Justice Thomas applied the *Auer* doctrine to an FCC interpretation of its own regulation, Justice Scalia concurred in the result, but said:

It is comforting to know that I would reach the Court’s result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural

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⁵⁵ John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). This article, written before *Auer* was decided, focused its criticism on *Seminole Rock*. It has been prominently cited in four Supreme Court cases in the last five years: Justice Scalia in his opinion in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J. concurring); Justice Alito in his majority opinion in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012); Justice Scalia again in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1336, 1341 (2013) (Scalia, J. concurring in part and dissenting in part); and Justice Alito again in *Perez v. Mortgage Banker*, 135 S. Ct. 1199 (2015) (Alito, J., concurring in part and concurring in the judgment). For another influential criticism, also written before *Auer*, see Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 11–12 (1996).

⁵⁶ *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

⁵⁷ *United States v. Mead Corp.* 533 U.S. 218 (2000).

⁵⁸ 546 U.S. 243, 257 (2006) (“Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”). See also *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. (1997) (“It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”).

⁵⁹ 131 S. Ct. 2254 (2011).

corollary—indeed, an a fortiori application—of [*Chevron*]. But it is not. When . . . an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning. . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well [citing Montesquieu].

Deferring . . . to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.⁶⁰

We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.

The next year, in *Christopher v. SmithKline Beecham Corp.*,⁶¹ the Court’s conservative majority refused to apply *Auer* where it found that to do so would result in “unfair surprise.” That same term it went back to applying *Auer* in *Decker v. Northwest Environmental Defense Center*,⁶² where it deferred to an EPA interpretation of a water pollution regulation, but Justice Scalia dissented on the merits and firmly rejected *Auer*: “Enough is enough. . . . *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.”⁶³ This time his dissent attracted the interest of Chief Justice Roberts (with Justice Alito) who wrote that Justice Scalia’s opinion “raises serious questions. . . . The issue is a basic one going to the heart of administrative law. . . . I would await a case in which the issue is properly raised and argued.”⁶⁴

Meanwhile there was similar increasing scrutiny on the breadth of the *Chevron* doctrine. In *City of Arlington, Texas v. FCC*,⁶⁵ the Court granted certiorari to settle a long unanswered

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⁶⁰ *Id.* at 2266 (Scalia, J. concurring).

⁶¹ 132 S. Ct. 2156, 2167 (2012).

⁶² 133 S. Ct. 1336 (2013).

⁶³ *Id.* at 1339, 1341 (Scalia, J. dissenting).

⁶⁴ *Id.* at 1338 (Roberts, C.J. concurring).

⁶⁵ 133 S. Ct. 1863 (2013).

question—whether *Chevron* applied to an agency statutory interpretation that enlarged its jurisdiction. To do this the Court chose a rather garden variety dispute. The Communications Act requires state or local governments to act on siting applications for wireless facilities “within a reasonable period of time after the request is duly filed.”⁶⁶ In another part of the Act, the FCC is given the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”⁶⁷ Relying on this delegation, the FCC issued a declaratory ruling that state and local governments normally have 90 days to process an application to place a new antenna on an existing tower and 150 days to process all other applications. The city thought those deadlines were too short, so it challenged the FCC’s authority to issue them, citing a “savings clause” in the Act that said that nothing in the Act, except the subsection that included the reasonable time provision, “shall limit or affect the authority of a State or local government” over siting decisions.⁶⁸

The Fifth Circuit held that the *Chevron* framework applied to the threshold question whether the FCC possessed statutory authority to adopt timeframes. It found the interplay of the savings clause and the reasonable time provision to be ambiguous, and then upheld as permissible under *Chevron* step two the FCC’s interpretation of its statutory authority to establish deadlines.⁶⁹ The appeals court then upheld the actual 90– and 150–day deadlines as reasonable.⁷⁰

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⁶⁶ 47 U.S.C. § 332(c)(7)(B)(ii).

⁶⁷ 47 U.S. C § 201(b).

⁶⁸ 47 U.S.C. § 332(c)(7)(A).

⁶⁹ *City of Arlington, Texas v. FCC*, 668 F.3d. 229, 249–254. (2012).

⁷⁰ *Id.* at 254–261.

At the Supreme Court, Justice Scalia, whose preference for decisional bright-line rules over what he called “the ol’ totality of the circumstances test”⁷¹ had led him to strongly defend *Chevron* in previous cases as superseding the *Skidmore* test,⁷² carried the banner for *Chevron* once again. He joined Justice Thomas and the liberals (save for Justice Breyer) in giving the FCC’s interpretation of the Communications Act deference. Justice Breyer, who does prefer a more multi-variable test,⁷³ also ruled for the FCC in a separate concurrence.

Justice Scalia’s argument was partly a pragmatic one: “[J]udges should not waste their time in the mental acrobatics needed to decide whether an agency’s interpretation of a statutory provision is ‘jurisdictional’ or ‘nonjurisdictional.’”⁷⁴ But he also was concerned that although that

false dichotomy . . . may be no more than a bogeyman, [ ] it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the “jurisdictional” card in every case.⁷⁵

But what was really notable about this case was the Chief Justice’s dissent. Joined by Justices Kennedy and Alito, he wrote that in this circumstance the lower court should not have applied *Chevron*, but “should have determined on its own whether Congress delegated

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⁷¹ See *U.S. v. Mead Corp.*, 533 U.S. 218, 241, where Justice Scalia, in dissent, complained that “The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test.”).

⁷² See his separate opinion in *Christensen v. Harris County.*, 529 U.S. 576, 589 (2000). (Scalia J., concurring in part and concurring in the judgment) (labeling *Skidmore* deference “an anachronism” and *Chevron* a “watershed decision”).

⁷³ See his concurrence in *City of Arlington*, 133 S. Ct. at 1875, where he quotes his own opinion in *Barnhart v. Walton*, as to the need to assess “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.” (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

⁷⁴ 133 S. Ct. at 1870.

⁷⁵ *Id.* at 1872–73

interpretive authority over § 332(c)(7)(B)(ii) to the FCC before affording *Chevron* deference.”⁷⁶

In other words, reviewing courts would have to find not simply a delegation to make interpretations of the overall program statute, but instead a specific delegation to interpret the particular ambiguous provision at issue. This would sharply limit the situations where *Chevron* would apply.⁷⁷

Why did the Chief Justice want to do this? The rest of his opinion makes clear that he thinks the Administrative State has too much power. He quotes his own opinion in the *PCAOB* case: “The administrative state ‘wields vast power and touches almost every aspect of daily life.’”⁷⁸ He states: “The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities. ‘[T]he administrative state with its reams of regulations would leave them rubbing their eyes.’”⁷⁹ He goes on, “It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”⁸⁰ And finally he caps his argument by quoting *Marbury v. Madison*, “It is

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⁷⁶ *Id.* at 1886 (Roberts, C.J., dissenting).

⁷⁷ Justice Scalia responded to this by saying:

What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field. There is no such case, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.

Id. at 1873.

⁷⁸ *Id.* at 1878 (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)).

⁷⁹ *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). It is, of course, impossible to disprove such a statement, but, as Professor Mashaw discovered, “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with coercive powers, created some systems of administrative adjudication, and specifically authorized administrative rulemaking.” Mashaw, *supra* note 6, at 5.

⁸⁰ *Id.* (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) and *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

emphatically the province and duty of the judicial department to say what the law is,”⁸¹ adding “The rise of the modern administrative state has not changed that duty. Indeed, the Administrative Procedure Act, governing judicial review of most agency action, instructs reviewing courts to decide ‘all relevant questions of law.’”⁸²

This increasing skepticism of deference to agencies’ legal interpretations lay somewhat dormant for the next two years—until March 9, 2015, when the Supreme Court decided two cases that, without dissent, but with spirited concurrences, reversed separate decisions of the D.C. Circuit authored by Judge Janice Rogers Brown, *Perez v. Mortgage Bankers*⁸³ and *Dep’t of Transportation v. Ass’n of American Railroads* (also known as the *Amtrak* case).⁸⁴

I mention Judge Brown’s name for a reason. Appointed to the D.C. Circuit in 2005 after serving on the California Supreme Court and as a state government official, Judge Brown’s anti-New Deal views were well known. In a 2000 speech to the Federalist Society chapter of the University of Chicago Law School, she gave a remarkable speech that can only be appreciated for its radicalism if read in its entirety. But one passage makes her views clear:

Big government is not just the opiate of the masses, it is *the* opiate. The drug of choice for multi-national corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens. It is my thesis today that the sheer tenacity of the collectivist impulse—whether you call it socialism or communism or altruism—has changed not only the meaning of our words, but the meaning of our Constitution, and the character of our people.⁸⁵

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⁸¹ *Id.* at 1880, quoting *Marbury*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

⁸² *Id.* at 1880, quoting 5 U.S.C. § 706. There are strong echoes of this rhetoric in the Chief Justice’s opinion for the Court in *King v. Burwell* case, 135 S. Ct. 2480 (2015), see text *infra*, at notes 110–12.

⁸³ 135 S. Ct. 1199 (2015).

⁸⁴ 135 S. Ct. 1225 (2015).

⁸⁵ Janice Rogers Brown, “A Whiter Shade of Pale: Sense and Nonsense—the Pursuit of Perfection in law and Politics, speech to The Federalist Society, University of Chicago Law School, (Apr 4, 2000), *available at* <http://communityrights.org/PDFs/4-20-00FedSoc.pdf>.

Judge Brown also displayed these views in an unusual D.C. Circuit opinion in 2012. The case, *Hettinga v. United States*,⁸⁶ was a constitutional challenge to a statute setting up the milk marketing order program. The challengers argued that the Act, which required them (as large producer-handlers of milk) to make financial contributions required of all milk handlers, was a bill of attainder and violated the Equal Protection and Due Process Clauses. The district court ruled against them and the D.C. Circuit in a per curiam opinion had little trouble affirming, based on long-standing precedents rejecting such arguments in the past. However, Judge Brown (joined by Judge Sentelle) penned a long concurrence to the per curiam opinion where she said how she really felt:

The Hettingas' sense of ill-usage is understandable. So is their consternation at being confronted with the gap between the rhetoric of free markets and the reality of ubiquitous regulation. The Hettingas' collision with the [milk marketing statute]—reveals an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.⁸⁷

Views like this led Cass Sunstein and Adrian Vermeule to label Judge Brown and several of her colleagues on the D.C. Circuit as practitioners of “libertarian administrative law.”⁸⁸

Her jurisprudence reached the Supreme Court this March with the review (and unanimous reversal) of her decisions in the *Mortgage Bankers* and *Amtrak* cases.⁸⁹ But although the government prevailed in both, several of the Justices seemed to sympathize with her and continued their running dialogue expressing doubt about *Auer* deference and even *Chevron*.

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⁸⁶ 677 F.3d 471 (D.C. Cir. 2012).

⁸⁷ *Id.* at 480 (Brown, J. concurring).

⁸⁸ Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). They refer to the *Hettinger* concurrence as “startling” and declare that it “is best understood as a kind of manifesto of libertarian administrative law.” *Id.* at 406.

⁸⁹ Her D.C. Circuit decisions are *Mortgage Bankers Ass’n v. Harris*, 720 F. 3d 966 (D.C. Cir. 2013) and *Ass’n of American Railroads v. U.S. Dept. of Transportation*, 721 F.3d 666 (D.C. Cir. 2013).

In *Mortgage Bankers*, the Court reviewed the D.C. Circuit’s line of cases known as the *Paralyzed Veterans* doctrine (sometimes called the *Alaska Hunters* doctrine) that held that when an agency had interpreted its own regulation through an interpretative rule once, it could not change that interpretation again without going through notice-and-comment rulemaking.⁹⁰ The Court unanimously held that this doctrine added a requirement not present in the APA and therefore was inconsistent with *Vermont Yankee*. But Justices Alito, Scalia and Thomas could not let this pass without some extensive commentary on the deference doctrines.

For example, this is from Justice Alito’s concurring opinion:

I agree that the *Paralyzed Veterans* doctrine is incompatible with the APA. The creation of that doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court’s cases holding that courts must ordinarily defer to an agency’s interpretation of its own ambiguous regulations. See *Seminole Rock*. I do not dismiss these concerns, but the *Paralyzed Veteran* doctrine is not a viable cure for these problems. At least one of the three factors noted above, however, concerns a matter that can be addressed by this Court. The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.⁹¹

Justice Thomas’s long concurrence ends this way: “By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.”⁹² Not to slight the *Chevron* doctrine, he made the same point about it a few months later, suggesting there are “serious questions about the

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⁹⁰ The doctrine was announced in dicta in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. (1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking,”) and applied in *Alaska Professional Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

⁹¹ *Mortgage Bankers*, 135 U.S. at 1210 (Alito, J. concurring in part and concurring in the judgment).

⁹² *Id.* at 1225 (Thomas, J. concurring in the judgment).

constitutionality of our broader practice of deferring to agency interpretations of federal statutes.”⁹³

Justice Scalia kept up his attack on *Auer/Seminole Rock*, but he also for the first time showed second thoughts about *Chevron*. (Bear in mind that just two years earlier, he was the principle defender of *Chevron* against a strong dissent by Chief Justice Roberts in the *City of Arlington* case.⁹⁴) Here is what Justice Scalia said in *Mortgage Bankers*—quite a different tone: “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” (citing *Chevron*).⁹⁵ He continued, “The problem is bad enough, *and perhaps insoluble if Chevron is not to be uprooted*, with respect to interpretive rules setting forth agency interpretation of statutes. But an agency’s interpretation of its own regulations is another matter.”⁹⁶ And he then went on to reiterate his criticism of *Auer*.

Justice Scalia (joined by Justice Thomas) expressed an even more portentous reservation about *Chevron*’s scope in a concurrence to a denial of certiorari in *Whitman v. U.S.*, involving a petition to review a conviction for violation of a statute administered by the SEC.⁹⁷ He first makes the non-controversial point that “A court owes no deference to the prosecution’s interpretation of a criminal law.”⁹⁸ This is related to the rule of lenity in construing criminal statutes, which “requires interpreters to resolve ambiguity in criminal laws in favor of

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⁹³ *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

⁹⁴ *See supra*, text at notes 71–75.

⁹⁵ *Id.* at 2121 (Scalia, J. (concurring in the judgment)).

⁹⁶ *Id.* (emphasis supplied).

⁹⁷ *Whitman v. U.S.*, 135 S. Ct. 352 (2014). (Scalia, J. concurring).

⁹⁸ *Id.* (citing *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014)).

defendants.”⁹⁹ But then he suggests that “if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings.”¹⁰⁰ This would mean that even in civil enforcement actions, which surely form the bulk of regulatory enforcement actions, *Chevron* would not apply if the governing statute also contained criminal penalties. It would also logically bar the application of *Chevron* in a pre-enforcement challenge to a regulation that might bear on a subsequent criminal prosecution. The Court’s precedent on this point is decidedly mixed. In a deportation case (nominally civil, but based on a criminal conviction), the Court did apply the rule of lenity,¹⁰¹ as did a plurality of the Court in a tax case,¹⁰² but the Court also (subsequent to the tax case) applied *Chevron* in the context of a pre-enforcement challenge to the Interior Department’s interpretation of the word “take” in the Endangered Species Act.¹⁰³ In the latter case, the Court specifically rejected the application of the rule of lenity in this context: “We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.”¹⁰⁴ In his *Whitman* concurrence, Justice Scalia characterized that case as a “drive by ruling”¹⁰⁵ and, though he felt the *Whitman* case did not present a good case for revisiting that holding (partly because the petitioner did not raise the issue), “when a petition properly presenting the question comes before us, I will be receptive to granting it.”¹⁰⁶

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⁹⁹ *Id.* at 353.

¹⁰⁰ *Id.* at 353–54.

¹⁰¹ *Leocal v. Ashcroft*, 543 U.S. 1, 11–12, n. 8 (2004).

¹⁰² *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518, n. 10 (1992) (plurality opinion).

¹⁰³ *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, (1995).

¹⁰⁴ *Id.* at 704 n.18.

¹⁰⁵ *Whitman*, 135, S. Ct. at 354 (“*Babbitt’s* drive-by ruling, in short, deserves little weight.”).

¹⁰⁶ *Id.*

In the *Whitman* concurrence, Justices Scalia and Thomas do at least have some caselaw in support of their position. But in his concurrence in the *Amtrak* case, Justice Thomas took perhaps the most radical anti-regulatory position of any of his brethren. He not only cited four different times to Philip Hamburger's recent book entitled *Is Administrative Law Unlawful?*,¹⁰⁷ he also criticized the Court's allowance of broad Congressional delegations to the Executive. This passage is quite remarkable:

Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. *I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process. . . .* I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.¹⁰⁸

It would also consign administrative rulemaking to the trash heap.

I will conclude with a thought about the Chief Justice's opinion for the Court in the highly anticipated *King v. Burwell* case,¹⁰⁹ decided after I began this article, involving an IRS interpretation of a key provision of the Affordable Care Act. He upheld the government's reading of the Act, but took the opportunity to further articulate his views on a more limited scope of *Chevron*:

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is one of those cases. Whether [tax] credits are

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¹⁰⁷ *Amtrak*, 135 S. Ct. at 1242, (Thomas, J. concurring in the judgment) (citing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 33–34 (2014), at 1243, (citing Hamburger at 35–36); *id.* (citing Hamburger at 38); at 1244 (citing Hamburger at 39, n.17). The book was sharply criticized by Professor Vermeule, Adam Vermeule, "No," *Book Review of "Is Administrative Law Unlawful"?* By Philip Hamburger, 93 Tex. L. Rev. 1547, 1547 (2015) ("The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.").

¹⁰⁸ *Id.* at 1252 (emphasis supplied).

¹⁰⁹ 135 S. Ct. 2480 (2015).

available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

Conservative columnist George Will wrote a strongly critical column the day after this decision, hyperventilating that “While purporting to not apply *Chevron*, Roberts expands it to empower all of the executive branch to ignore or rewrite congressional language that is not at all ambiguous but is inconvenient for the smooth operation that Congress created.”¹¹⁰ But a week later, Will had seen a silver lining. He now realized that:

[T]he court denied the power of the IRS—and inferentially, the power of the executive branch—to be the final word on statutory interpretation. . . . Roberts’s ruling advanced a crucial conservative objective, that of clawing back power from the executive branch and independent agencies that increasingly operate essentially free from congressional control and generally obedient to presidents.”¹¹¹

In closing, at least five of the current Justices have expressed, or joined expressions of, strong opposition to several of the key pillars of the modern administrative state. We will see where this may end. Will *Chevron* and *Auer* survive? Will the non-delegation doctrine be revived? Will arbitrary-and-capricious review become a harder look?¹¹² Will agency adjudicative power be curtailed?¹¹³ Will even *Vermont Yankee* eventually come to be

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¹¹⁰ George F. Will, *The Supreme Court’s decision to legislate*,” WASH. POST A21 (June 26, 2015).

¹¹¹ George F. Will, *The wrinkle in Roberts’s decision*,” WASH. POST A17 (July 5, 2015).

¹¹² One possible new indication of that is *Michigan v. EPA*, 135 S. Ct. 2699 (2015), decided on the last day of the Term. Authored by Justice Scalia, it invalidated an EPA regulation of emissions of hazardous air pollutants from power plants because EPA failed to consider cost of compliance before deciding whether regulation is appropriate and necessary, quoting *State Farm* for the proposition that “agency action is lawful only if it rests ‘on a consideration of the relevant factors.’” *Id.* at 2706 (quoting *State Farm*, 463 U.S. at 43). The four dissenters argued that while EPA did not consider costs in determining that some regulation was necessary, as it proceeded in the rulemaking process, it “later took costs into account again and again.” *Id.* at 2714 (Kagan, J., dissenting).

¹¹³ See *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1316, (2015) (Thomas, J., dissenting), where Justice Thomas, joined by Justice Scalia, in the context of whether a decision by an administrative board could have issue-preclusive effect on a federal court, opined that “[b]ecause federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights.”

questioned? There are some inconsistencies among these opinions, and I may be reading too much into them, since most of them are not (yet?) majority opinions, but the signals of opposition are becoming too strong to ignore.