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Judicial review of administrative action in the United States*

Controle judicial da atividade administrativa nos Estados Unidos

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Abstract: In this article, the authors explain and evaluate the judicial review of administrative action under the United States Constitution. After discussing the birth of the administrative state, the authors introduce and analyze the forms of judicial review of administrative action as well as the origins and variable degree of judicial deference to administrative action. The authors close with a discussion on the future of judicial review of administrative action in the United States.

Keywords: Judicial review. Administrative state. Judicial deference. New Deal. United States Constitution.

Resumo: Neste artigo, os autores explicam e avaliam o controle judicial da atividade administrativa sob a égide da Constituição dos Estados Unidos. Após tratar sobre o nascimento do Estado Administrativo, os autores apresentam e analisam as formas de controle judicial da ação administrativa, bem como a origem e os variados graus de deferência do Judiciário em relação à ação administrativa. Os autores concluem com uma discussão sobre o futuro do controle da ação administrativa nos Estados Unidos.

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1 The Birth of the Administrative State

The administrative state is not mentioned anywhere in the United States Constitution. The Constitution creates the primary institutions of government, namely the Presidency, the Congress and the courts, but it generally does not require the creation of additional institutions.[1] And yet today administrative agencies – creatures of congressional statutes – now feature prominently in the government of the United States.

Prior to the twentieth century, the United States did not rely much on administrative agencies. However, as new technologies emerged and the country's population increased, administrative agencies became something of a necessity for the federal government. Federal agencies gradually gained more authority in the American legal system as industry grew larger and more involved in the national economy.[2]

Administrative agencies are a relatively new phenomenon spurred by major moments in American history. After the Civil War, the country experienced a rapid economic expansion, which prompted the creation of a national railroad system.[3] The advent of railroads, common carriers, and the natural monopolies that accompanied them during the late nineteenth century led to the creation of the Interstate Commerce Commission ("ICC"). Traditional common law methods had proven inadequate to face the challenges raised by the quickly expanding railroad industry.[4] Railroads had grown too powerful to be controlled by state regulators, which had traditionally protected the public from abusive practices, giving rise to the need for a "cop on the beat" at the federal level.[5] During this period, the public trusted the agencies and believed them to be non-partisan tools to enact change that private litigants otherwise could not accomplish.[6]

1 *See* U.S. CONST., arts. I § 1, II § 1, III §1.

2 *See* Edward L. Metzler, *The Growth and Development of Administrative Law*, 19 MARQ. L. REV. 209, 211 (1935) (describing the growth of the railroad industry as the first reason for the growth of federal regulations).

3 Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1197 (1986).

4 Bernard Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L. J. 263, 267 (1961).

5 *See id.* at 1194.

6 *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 (1987) (discussing the view that administrative agencies regulated and protected the public more efficiently than the three branches of government, including the judicial branch).

Although the ICC had the narrow purpose of regulating railroads, its establishment paved the way for federal regulation of other domains.[7] The New Deal further expanded the administrative state. As the country dealt with a major economic crisis, administrative agencies with broad governing authority and political independence were thought to be a solution to the crisis in government.[8] During this time, the federal government established new agencies such as the National Labor Relations Board and the Social Security Administration.[9]

The judiciary played an important role in this era of administrative expansion. Although the Judicial Procedures Reform Bill of 1937 (also known as President Franklin Delano Roosevelt's "court-packing" scheme) failed to pass in Congress, the initiative demonstrated that political actors realized the importance of the judiciary to the administrative state.[10] In the initial years of the New Deal, the Court was reluctant to uphold many of the new initiatives in federal regulation. However, by 1937, the Supreme court, persuaded that the Commerce and Spending clauses justified the expansion of federal government power, began to recognize the role of federal regulation through the administrative state.[11]

The public has not always viewed administrative agencies in this same way. Until the early 1950s, the predominant view was that agencies relied on their knowledge and expertise to promote the public interest.[12] However, by the 1960s, pessimism over agency bias began to grow as scholars argued that agencies eventually became captured by the industries they regulate.[13] Since the 1980s, the predominant view has seen administrative agencies at their best – as flexible, open to comments and contributions from public interest groups, and in dialogue with courts that can exercise judicial review of agency decisions on the strength of increasingly flexible rules on standing.[14]

Today, administrative agencies have broad authority to make decisions and rules through rulemaking and adjudication. Although the public is offered some opportunity to participate in these decisions, citizens might nonetheless find

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7 *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1333-1334 (1998) (noting that the ICC set forth a model for the regulation of domains as diverse as the shipping and aviation, telephone and telegraph, and gas and electric industries).

8 Sunstein, *supra* note 6, at 423.

9 *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1563 (1996). These two agencies were established by their respective organic statutes, the National Labor Relations Act of 1935 and the Social Security Act of 1935. *Id.*

10 *See* Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENTARY 1 (2013).

11 U.S. v. Darby, 312 U.S. 100, 117 (1941) (upholding Fair Labor Standards Act as constitutional under Commerce Clause); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (upholding provisions of the Social Security Act as constitutional under Spending Clause); NLRB v. Jones & Laughlin, 301 U.S. 1, 49 (1937) (upholding National Labor Relations Act as constitutional under Commerce Clause).

12 JAMES LANDIS, THE ADMINISTRATIVE PROCESS 154 (1938).

13 Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997).

14 James Q. Wilson, *The Politics of Regulation, in* THE POLITICS OF REGULATION 357, 385–86 (1980).

themselves needing to seek a remedy from an administrative decision. The solution to possible errors or wrongdoing by administrative agencies is the power to seek review in a court of law.[15] As a result, judicial review has played an important role as a check on the expansion of the administrative state.

2 The Forms and Functions of Judicial Review of Administrative Action

There are limits to judicial review of administrative action. Before parties may petition a court to review an administrative decision, typically they must exhaust all available administrative remedies if the relevant statute or agency rules require exhaustion.[16] Parties must also have standing in order to seek review of an agency action. The requirement of standing allows courts to exclude frivolous claims. Courts want to ensure that their caseloads are not overwhelmed by these claims and that the parties could actually litigate the case.[17] Demonstrating standing in connection with an administrative action is often not a difficult requirement to satisfy. Courts have granted standing in order to adjudicate a wide array of legal harms from agency decisions, ranging from aesthetic harm from the construction of a dam to effects on business competition.[18] Once exhaustion and standing are met, the scope of judicial review nonetheless remains limited. This limited scope is outlined in the Administrative Procedure Act ("APA").[19]

Prior to the enactment of the APA, agencies had great flexibility in rulemaking and adjudications.[20] The enactment of the APA coincided with the reforms of the New Deal, which ushered in the expansion of the administrative state. Consequently, problems arose because New Deal legislation did not include procedural rules on governing these agencies' actions.[21] The APA was enacted in 1946 with the objective to protect citizens against the expanding administrative state.

The APA creates a procedural framework that administrative agencies must ordinarily follow. The procedural requirements in the APA are based on the distinctions

15 *See* 5 U.S.C. § 702.

16 *See* Darby v. Cisneros, 509 U.S. 137, 154 (1993) (holding that courts could not require plaintiff to exhaust administrative remedies because HUD's organic statute did not have exhaustion requirement).

17 William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988).

18 *See* Power Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) (holding that aesthetic harm can aggrieve plaintiffs under the organic statute, the Federal Power Act); Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO, 498 U.S. 517, 530 (1991) (holding that Postal Service Union did not have standing to challenge the international re-mailing policy because they were not in the zone of interests that Congress sought to protect by enacting the organic statute). The APA grants persons who suffer a "legal wrong because of agency action" or are "adversely affected or aggrieved by agency action within the meaning of a relevant statute" the right to judicial review of an agency action. 5 U.S.C. § 702.

19 *See* 5 U.S.C. §§ 702, 706.

20 Henry J. Friendly, *"Some Kind of Hearing",* 123 U. PA. L. REV. 1267, 1272 (1975).

21 Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 214 (2016).

between formal and informal action, and rulemaking and adjudication.[22] If an agency is engaged in a formal action, it is likely to be held to higher procedural standards than for informal actions.[23] However, in order to qualify as "formal" rulemaking or adjudication, the statute must include language that requires the action to be made on the record. The APA's rules for formal adjudication require trial-type procedures, including notice to affected parties and the opportunity to submit arguments.[24] The APA requires agencies engaging in formal rulemaking also to establish trial-type procedures, including allowing interested parties to testify and cross-examination of witnesses.[25] As it happens, informal adjudication is the most frequently used type of administrative action yet the APA is silent on what if any procedures it requires.[26]

In addition to outlining the procedural requirements to ensure public participation and awareness, the APA defines the scope of judicial review of administrative actions. The Act relies on the presumption that Congress intended courts to review administrative actions. Section 702 of the Act establishes a cause of action for those adversely affected or aggrieved by an agency action.[27] Section 706 explains the scope of judicial review of agency action.[28] According to this section, reviewing courts shall compel agency action if the action is unlawfully withheld or unreasonably delayed.[29] The APA also establishes an arbitrariness standard for reviewing agency discretion in its decisions. Courts shall also hold unlawful or set aside agency action, findings, and conclusions in circumstances where, for instance, the actions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".[30]

There was a time when courts were also thought to have power to layer procedural requirements onto agency action over and above what is required by the APA. However, this practice was largely curtailed by the Supreme Court in the 1978 *Vermont Yankee* decision.[31] In this case, the Supreme Court held that the Atomic Energy Commission had complied with the APA and that the lower court could not

22 5 U.S.C. §§ 553, 554, 556. The APA defines formal as anything that is "required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c). Any other proceedings are considered informal. *Id*. The APA defines rule as "the whole or a part of an agency statement of general or particular applicability and future effect". 5 U.S.C. § 551(4). The APA defines adjudication as an "agency process for the formulation of an order. 5 U.S.C. § 551(7).

23 *See* Matthew D. McCubbins, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989).

24 5 U.S.C. § 553; Friendly, *supra* note 21, at 1272.

25 5 U.S.C. § 556.

26 Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 108 (2003).

27 5 U.S.C. § 702.

28 5 U.S.C. § 706.

29 5 U.S.C. § 706(1).

30 5 U.S.C. § 702(2).

31 Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

impose further procedural requirements. The reasoning behind this decision was that Congress had already outlined the requirements that agencies must follow.[32] Further, if courts were authorized to require more procedures from administrative agencies, agencies would be faced with the uncertainty over how much procedure is in fact required. The decision also recognized that procedural constraints are required for certain agency action. For example, a court can review an agency action for additional procedures if constitutional constraints, such as due process, are involved. Courts also retain authority to impose procedural rules on agencies if those kinds of rules are necessary to carry out the purposes of the APA.[33]

Judicial review of administrative action reached a significant turning point in 1984 with the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*. In *Chevron*, the petitioners argued that the Environmental Protection Agency ("EPA") incorrectly interpreted the Clean Air Act's requirement for national air quality standards as a single bubble.[34] The Supreme Court upheld the EPA's interpretation of the Act, holding that it was a permissible construction of the agency's organic statute and that it was therefore entitled to deference.[35]

In its decision, the Court clearly articulated the deference standard that has since been granted to agency interpretations of congressional statutes. *Chevron* deference involves a two-step analysis to determine whether an agency should be granted deference for an action based on a statutory interpretation. A court must first determine whether the statute is clear or ambiguous on the issue. Where the statute is clear, the court must enforce the clear meaning of Congress.[36] But where the statute is ambiguous, the court must defer to the agency's interpretation of the statute if that interpretation is reasonable, even if the court believes the agency's interpretation is not the best one, or if the court would itself have interpreted the statute differently.[37]

3 Deference in Judicial Review of Administrative Action

Since it was decided in 1984, *Chevron* has continued to play an important role in administrative law. For the past three decades, agency actions have been scrutinized through the lens of *Chevron* in cases ranging from the environment to labor and

[32] *Id.* at 548.
[33] *Id.* at 548-549.
[34] 467 U.S. 837, 837 (1984). The Clean Air Act Amendments require noncompliant states to establish a permit program before adding or modifying a "stationary source" that emits pollution. *Id.* The possible interpretations of the word "stationary source" have different implications for obtaining a permit. *Id.* The EPA's definition of "bubble" meant that states would treat a plant and the pollution-emitting devices in on industrial grouping as one "bubble". *Id.*
[35] *Id.* at 866.
[36] *Id.* at 842.
[37] *Id.* at 843-44.

employment. The extent of *Chevron*'s effect on judicial review of administrative action cannot be understated. For 200 years, courts have adhered to former Chief Justice John Marshall's command in *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is".[38] But under *Chevron*, that duty has shifted in administrative law cases from courts to agencies.[39]

Chevron deference raises important constitutional questions about administrative agencies. By shifting the duty of interpretation to the agencies, the constitutional powers granted to the judiciary by the Constitution and the *Marbury* decision are diminished when it comes to administrative law.[40]

Chevron jurisprudence has had a revolutionary impact on the relationship between courts and the administrative state. For example, in the *Brand X Internet Services* decision, the Supreme Court declared that when the court and the agency interpret an issue differently, the proper interpretation depends on how the court reached its decision.[41] The Court reasoned that when Congress writes an ambiguous statute, it implicitly delegates the decision-making power of resolving the ambiguity to the agency.[42] The Court therefore held that agency interpretations can override court decisions where the statute is ambiguous and the agency's interpretation is reasonable. Where the statute is unambiguous, the court will defer to the judicial interpretation.

Courts generally defer to the agency's interpretation of the law. Traditionally, the central function of the judiciary was interpretation of the law. Today, the *Chevron* doctrine of deference calls into question the independence of the American judiciary. The consequences of judicial deference have been substantial because courts review agency decisions with the knowledge that *Chevron* guides them to defer to the agency when the two steps are met. By automatically deferring to agencies, federal courts are arguably deprioritizing their independent analysis of the law.[43]

Prior to the *Chevron* decision, courts engaged in a case-by-case analysis of agency actions. Rather than automatically deferring to an agency's judgment, courts would analyze the agency's organic statute and the authority granted to the agency by Congress. Although at the time the agency had less leeway to interpret the law, judges were exercising their constitutional discretion to determine the amount of deference to grant based on the specific facts presented.[44] Under *Chevron*, the scope of deference has ballooned.

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38 Marbury v. Madison, 5 U.S. 137, 167 (1803).

39 Cass R. Sunstein, *Law and Administration After Chevron,* 90 COLUM. L. REV. 2071, 2074 (1990).

40 *See Chevron*, 467 U.S. at 843; *Marbury*, 5 U.S. at 167.

41 Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

42 *Id.*

43 Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 313 (1988).

44 *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275, 1276 (1991).

Modern case law has tilted toward granting great deference to administrative agencies. The need for agency expertise and discretion cannot be denied.[45] The benefit of this deference is that agencies possess significant authority in governing their specific area of expertise. However, the downside of deference may well be its effect on the checks and balances that make the American government work in the public interest.

Another issue that arises out of the flexibility granted to agencies is the lack of participation by private parties in the decision-making process. The court has been left nearly powerless to find ways to involve the public outside of what is contemplated in the APA, in an agency's organic statute, or in the agency's procedural regulations. It does not help that the APA imposes minimal procedural constraints on agencies, especially for informal adjudication.[46]

Finally, the prevalence of *Chevron* deference has made it difficult for courts to overrule agency decisions when agencies have crossed the line dividing constitutional from unconstitutional conduct. Opposing parties often spend a significant amount of resources litigating against agencies in cases involving the *Chevron* doctrine, but to little avail. Administrative agencies have been likely to prevail in litigation under the umbrella of deference granted by *Chevron*, making it less likely for a private party to prevail when they are aggrieved by an agency's interpretation of the law.[47]

4 Narrowing Deference in Judicial Review of Administrative Action?

Although *Chevron* deference has been a hallmark of administrative law since the Supreme Court issued its decision in 1984, some scholars have noted that courts have recently been reluctant to apply the doctrine as robustly as they once did.

In *Michigan v. EPA*, the Supreme Court overruled a decision by the EPA to not consider costs in its decision to set limits on emissions from coal-fired power plants.[48] In this 2015 decision, the Court discussed *Chevron* but refused to find the agency's decision reasonable at step two of the analysis.[49] Under the Court's judgment, agencies must now act within narrower bounds of reasonableness in order to be granted deference.[50] Historically, courts were very lenient in finding an agency's

[45] *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 310 (1986) (noting the advantages of relying on agency expertise).
[46] *See* Rubin, *supra* note 26, at 108.
[47] Sunstein, *supra* note 39, at 2119.
[48] 135 S. Ct. 2699, 2707 (2015).
[49] *Id.*
[50] *See Michigan v. E.P.A.*, 135 S. Ct. at 2707.

interpretation reasonable at this step of the *Chevron* analysis.[51] The Court's decision in *Michigan v. EPA* may signal a lasting departure from this leniency.

In *King v. Burwell*, the Supreme Court considered the Internal Revenue Service's (IRS) interpretation of a provision in the Affordable Care Act.[52] The Court upheld the IRS interpretation but refused to apply *Chevron* deference to reach that result, holding that this deference is inappropriate in cases involving "major questions" of "deep economic and political significance".[53] The Court's refusal to apply *Chevron* in this tax law case could be viewed as another step to curtail the doctrine's deep deference in judicial review of administrative actions.[54]

These recent decisions suggest that *Chevron* deference could play a lesser role in the administrative case law of the future. It is possible that *Chevron* might be entering a future when the court will not apply the doctrine to cede unfettered authority to agencies.[55] There have been suggestions, both explicit and implicit, to either rework the *Chevron* doctrine for the modern era or overrule it completely.[56] Yet it is of course possible for courts to take into account agency expertise without automatically granting deference.

5 The Future of Judicial Review of Administrative Action

The administrative state is often referred to as the "fourth branch of government" because although it is not explicitly mentioned in the Constitution it has managed to rise to a level of importance similar to the other branches.[57] While judicial review is one way to check the expansion of the administrative state, the deference granted to administrative agencies has conferred upon agencies great flexibility – and power – in their actions.

Compared to earlier periods in administrative law, the public today has more opportunities to challenge agency decisions through judicial review. However, the *Chevron* doctrine poses a threat to the public's capacity to get judicial relief from agency wrongdoing or inaction because the doctrine limits a court's ability to question the agency. On the other hand, agencies' ability to make effective regulations

51 *See Chevron*, 467 U.S. at 843.
52 King v. Burwell, 135 S. Ct. 2480, 2482 (2015).
53 *Id.* at 2489.
54 *See id.*
55 *See Michigan v. E.P.A.*, 135 S. Ct. at 2707; *Burwell*, 135 S. Ct. at 2489.
56 *See, e.g.,* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (noting that step two of the *Chevron* analysis and the "arbitrary and capricious" standard under § 706(2)(A) of the APA are identical and, thus, courts should apply the arbitrariness review instead of *Chevron* step two); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354–355 (1994) (noting the clash between the rise in textualism and the *Chevron* doctrine).
57 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

and to defend their decisions in federal courts may be compromised if *Chevron* deference ends.

Looking ahead, judicial review will continue to determine the position of administrative agencies under law. But perhaps the deference granted to administrative agencies over the preceding decades may soon be a remnant of past jurisprudence.

Recent developments in other branches of government suggest that the wide latitude given to agencies in the modern era may indeed be nearing its end. The most recently confirmed Supreme Court Justice, Neil Gorsuch, has taken a critical approach to the expanding power of administrative agencies in opinions such as *Gutierrez-Brizuela v. Lynch*.[58] Justice Gorsuch has criticized the prevailing doctrine of *Chevron* deference in administrative law and even referred to it as an "elephant in the room" because of its inconsistency with the allocation of judicial and legislative powers in the Constitution.[59] This is significant because he replaced the late Justice Antonin Scalia, who was probably the Court's most ardent *Chevron* defender.[60]

A week prior to the President Donald Trump's nomination of now-Justice Gorsuch, the House of Representatives passed a bill – the Regulatory Accountability Act of 2017 – that would effectively overturn *Chevron.* The bill revises the scope of judicial review to prohibit courts from deferring to agency decisions in certain circumstances.[61] Perhaps more controversially, President Trump signed an executive order in January 2017 requiring administrative agencies issuing one new regulation to cut at least two, a step that is seen as further limiting the flexibility of the administrative process.[62] Although all three branches of government have influenced and have been impacted by the growth of the so-called "fourth branch," it will remain up to the courts to determine how much deference is and should be due to administrative agencies.

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59 *Gutierrez-Brizuela,* 834 F.3d at 1154 (Gorsuch, J. concurring).

60 Henning, *supra* note 58.

61 Regulatory Accountability Act of 2017, H.R.5, 115th Cong. (1st Sess. 2017).

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