The Supreme Court’s 2014-2015 Term: The Year the Administrative State Trembled

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The Supreme Court’s 2014-2015 Term: The Year the Administrative State Trembled

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The opinions of the Supreme Court's most recent term indicate that the court's conservative justices are rethinking the scope and power of the administrative state.

In the weeks since its dramatic conclusion, the Supreme Court's 2014-2015 term has been called one of the most liberal in decades, with almost all of the Court's landmark rulings hailed by the left and condemned by the right.
Quietly, however, the past term witnessed an important intellectual shift among the conservative justices: an increasing willingness to rethink the Court’s jurisprudence regarding the power of federal agencies. Across several cases spanning various doctrines, all five of the conservative justices expressed views that called into question significant aspects of the administrative state and that could move the Court in a more conservative direction in the years to come.

**King v. Burwell**

The most high-profile example occurred in *King v. Burwell*, the much-anticipated Affordable Care Act case. The question in *King* was whether the Act authorized subsidies to be offered on exchanges established by the federal government, even though the operative provision of the Act only mentioned subsidies for exchanges “established by the State.” Some, including the court of appeals, believed that the statute was ambiguous and invoked a doctrine known as *Chevron* deference. *Chevron* deference is a judge-made rule of administrative law that requires courts to defer to an agency’s reasonable interpretation of an ambiguous federal statute.

*Chevron*’s role in buttressing the administrative state is difficult to exaggerate. As the chief justice himself has observed, “*Chevron* is a powerful weapon in an agency’s regulatory arsenal” because “[c]ongressional delegations to agencies are often ambiguous,” leading to widespread judicial deference to agency-favored statutory interpretations. In *King*, applying *Chevron* would have meant ruling in favor of the government’s view that the subsidies could be offered on federal exchanges.

Although the Supreme Court held that the subsidies could lawfully be made available on federal exchanges, Chief Justice Roberts’s majority opinion—which Justice Kennedy joined—disclaimed any reliance on *Chevron* deference. During oral arguments, Justice Kennedy had suggested that it would be “a drastic step” to permit an agency—rather than Congress...
—to decide such a momentous question as whether the subsidies would be available on federal exchanges. In line with this comment, the chief justice’s opinion explained that when interpretation of an ambiguous statutory provision implicates matters of “deep economic and political significance,” *Chevron* deference might not apply.

This rule had been established in an earlier case called *FDA v. Brown & Williamson Tobacco Corp.*, but its continuing vitality was an open question before *King*. The chief justice made it central to the reasoning in *King*, signaling a potential revival of the *Brown & Williamson* rule and a shift away from deference to agencies in important cases.

**Earlier Evidence: Growing Skepticism of Agency Power**

*King* was not the first time Chief Justice Roberts had voiced skepticism of agency power and the scope of *Chevron* deference. In the 2013 case *City of Arlington v. FCC*, the chief justice wrote a celebrated dissent—again joined by Justice Kennedy, as well as by Justice Alito—arguing that “the danger posed by the growing power of the administrative state cannot be dismissed,” and calling for a more limited view of *Chevron* deference. Roberts pointed out the “vast power” and “significant degree of independence” that agencies possess. After quoting Madison’s famous statement in *Federalist* No. 47 that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny,” Roberts went on to observe that agencies accumulate all three powers into their own hands as a “central feature of modern American government.” Coming only two years after *City of Arlington*, the chief justice’s opinion in *King* suggests that he and Justice Kennedy are prepared to take a more skeptical, jurisprudentially conservative view of agency power.

This move away from deference to agencies during the past term was even evident in the opinions of justices often portrayed as *defenders* of *Chevron*—Justice Scalia foremost among them. In *Perez v. Mortgage Bankers*...
Association, Justice Scalia authored a concurring opinion arguing that Chevron deference is in tension with the Administrative Procedure Act’s requirement that courts “decide all relevant questions of law” and “interpret . . . statutory provisions,” and he urged that a related deference doctrine—what is sometimes called Seminole Rock deference—be abandoned.

As Justice Scalia has observed, Seminole Rock deference, in practice,

is Chevron deference applied to regulations rather than statutes. The agency’s interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading — within the scope of the ambiguity that the regulation contains.

Seminole Rock has appeared increasingly vulnerable in recent years, as more justices—led by Justice Scalia—have said that they are willing to consider overruling it.

But while Scalia has been a strong critic of Seminole Rock, he is usually seen as one of Chevron’s greatest champions, authoring the majority opinion in City of Arlington that gave agencies expansive authority to define the scope of their own powers. When Scalia detected in City of Arlington that “the ultimate target [was] Chevron itself,” he forcefully rejected the challenge and reaffirmed Chevron. The importance of Justice Scalia’s Perez opinion must be seen against this background. For one of Chevron’s principal advocates to impugn its legitimacy—even if ultimately declining to call for its repudiation—is a striking development.

Reexamining the Administrative State

What was more striking, however, was Justices Thomas’s repeated push for a sweeping reexamination of the jurisprudence surrounding the administrative state. In several separate opinions, Justice Thomas questioned the constitutionality of some of the administrative state’s main
features. In both *Michigan v. EPA* and *Perez*, he strongly implied that the
d deference doctrines of *Chevron* and *Seminole Rock* are unconstitutional. In
Thomas’s view, because the Constitution vests legislative, executive, and
judicial power in the three respective branches, it would violate the
Constitution to permit the branches to reallocate their powers amongst
themselves. This idea—called the nondelegation doctrine—has been
consistently reaffirmed by the Supreme Court, but it has not been used to
invalidate a delegation of legislative authority to the executive branch since
1935.

Citing the nondelegation doctrine, Thomas argued that *Chevron* and
*Seminole Rock* rest on a presumed delegation to agencies of lawmaking or
judicial power in violation of the Constitution’s vesting clauses that begin
each of its first three articles. This was a genuine jurisprudential shift for
Justice Thomas, who had previously articulated an expansive view of
*Chevron* deference in a 2005 opinion called *National Cable &
Telecommunications Association v. Brand X* and who had joined Justice
Scalia’s majority opinion in *City of Arlington*.

Sometimes, the Court’s conservatives went even further. Justice Thomas
laid the intellectual foundation for his *Perez* and *Michigan* opinions in his
*Department of Transportation v. Association of American Railroads*
concurrence. There, he made an extended case for enforcing the
nondelegation doctrine in general, not just in the context of *Chevron* and
*Seminole Rock*.

Justice Alito likewise authored a separate opinion in *Association of American
Railroads* arguing that the Constitution does not permit agencies to wield
legislative or judicial power—or at least not to the extent that they
currently do. After noting the carefully designed lawmaking process
prescribed by the Constitution, Justice Alito remarked, “It would dash the
whole scheme if Congress could give its power away to an entity that is not
constrained by those checkpoints.” In arguing for a reinvigoration of a
judicial check on interbranch delegations of power, Justices Thomas and Alito took on a principal premise of the administrative state: the delegation of power from Congress to agencies to make law on major questions of public policy.

**Pushing Back against the Legacy of the New Deal**

These significant statements from the Court’s conservative justices did not arise in a vacuum. Rather, they are part of a broader push within the conservative legal movement for renewed resistance to agency power.

Most of the administrative state’s current features arose during the New Deal era, when the Court sustained them against constitutional attacks. The modern conservative legal movement has been skeptical of those New Deal judicial decisions ever since the movement’s birth in the 1970s. This view is best represented by Boston University professor Gary Lawson’s profoundly influential 1994 article, “*The Rise and Rise of the Administrative State*,” which argued that several features of the administrative state are unconstitutional. Yet, Lawson and a few others notwithstanding, legal conservatives have generally been willing to accept the administrative state’s existence and instead focus on ways to rein in its excesses.

Indeed, *Chevron* deference was originally thought to do just that. By permitting agencies, rather than judges, to decide what ambiguous statutes mean, conservative defenders of *Chevron* thought they would create political accountability for agency actions through presidential supervision. Three decades later, many legal conservatives have begun doubting whether that rationale was sound. As Chief Justice Roberts, quoting then-Professor Elena Kagan, noted in his *City of Arlington* dissent, “no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.”

In recent years, the sheer breadth of agency power, combined with agencies’ “significant degree of independence” from elected officials,
appears to have catalyzed a reappraisal within the conservative legal movement. Legal conservatives have begun advocating a complete overhaul of the doctrine surrounding the administrative state, and this trend has manifested itself in—and been influenced by—conservative legal scholarship.

**Scholarly Challenges**

Perhaps the two most important recent scholarly challenges have come from Professors Michael McConnell and Philip Hamburger. McConnell—a former federal appellate judge—authored an article with Professor Nathan Chapman arguing that, under the original meaning of the due process clause of the Fifth Amendment, the executive branch “could not deprive anyone of a right except as authorized by law.” Although the article does not appear on its face to be an attack on agency power, its authors acknowledge its implications for the delegations of power inherent in the modern administrative state: “at a certain point, broad delegations of standardless power to the executive strain the understanding that the executive can regulate conduct only pursuant to law.” It was no surprise, then, to see Justice Thomas repeatedly rely on McConnell’s article in his Association of American Railroads opinion to support his nondelegation analysis.

But whereas McConnell’s article attacked the administrative state indirectly, Hamburger’s 2014 book *Is Administrative Law Unlawful?* was a frontal assault. Hamburger argues that several of the administrative state’s main features are contrary to fundamental principles of the Anglo-American legal tradition going back several centuries. Indeed, he tries to show that many of those very principles were established *in reaction against* some of the same arguments currently made in favor of agency power. While McConnell hews closely to particular constitutional concepts like due process in analyzing the administrative state, Hamburger makes a broader critique based on *what law is* in the Anglo-American context.
The book has had an electrifying effect on the debate over agency power since its publication, quickly becoming a must-read among legal conservatives, and, like McConnell's article, it played a central role in Justice Thomas's *Association of American Railroads* concurrence. The willingness of the conservative justices to challenge the administrative state, then, is a natural outgrowth of a more general reevaluation of agency power within the conservative legal movement.

As of now, it does not appear that a majority of the Court is willing to go as far in that reevaluation as Professor Hamburger or Justice Thomas, and none of the opinions described here was joined by all the conservative justices. But these and other opinions from the past term convey a strong sense that the conservative justices are open to rethinking the scope and power of the administrative state, with all the far-reaching implications that would portend. Only subsequent cases will show whether this Supreme Court term was an isolated tremor or the indicator of a much more dramatic shakeup of agency power.

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