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In Memoriam: The Republican Form and the Separation-of-Powers Among the Four Branches of Government

Em memória: a forma republicana e a separação de poderes entre os quatro ramos do governo

Farris Lee Francis

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In Memoriam: The Republican Form and the Separation-of-Powers Among the Four Branches of Government

Em memória: a forma republicana e a separação de poderes entre os quatro ramos do governo

Farris Lee Francis**

Abstract

Energy in government has historically been thought of as one of the highest virtues of public service. Arguably, the only pillar tantamount to energy is its cousin, stability. While one may maintain that history enjoys no dearth of relics, it would appear tremendously hostile to assert the need for Federalist relics to remain boxed and waving from the past. At 81 years of age, spry and spirited, Dr. Benjamin Franklin was accosted by freshly minted citizen at the close of the Constitutional Convention. She inquired, "Well Doctor what have we got: a republic or a monarchy?" Franklin replied precisely and directly, "A republic, if you can keep it." The Framers envisioned a strict republican form of government for America. Embedded within the republican form lies the separation-of-powers doctrine. Indeed, the chief compliant of the Articles of Confederation was that its structure was wholly unorganized and unsound. Therefore, this paper addresses the necessity and application of the separation-of-powers doctrine, within the republican form, as a check on the powers and functions of the administrative state.

Keywords: Separation-of-powers, Constitutional Law, Administrative Law, Federalism, Originalism, Legal Theory.

Resumo

A energia no governo tem sido historicamente considerada uma das mais altas virtudes do serviço público. Indiscutivelmente, o único pilar equivalente a energia é seu primo, a estabilidade. Embora se possa sustentar que a história não tem escassez de relíquias, pareceria tremendamente hostil afirmar a necessidade de as relíquias federalistas permanecerem em caixas e acenando com o passado. Aos 81 anos, alegre e espirituoso, o Dr. Benjamin Franklin foi abordado por uma cidadã recém-formada no final da Convenção Constitucional. Ela perguntou: "Bem, doutor, o que temos: uma república ou uma monarquia?" Franklin respondeu de forma precisa e direta: "Uma república, se você puder mantê-la." Os conspiradores previam uma forma de governo republicana estrita para a América. Inserida na forma republicana, está a doutrina da separação de poderes. De fato, o principal complacente dos

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Artigos da Confederação era que sua estrutura era totalmente desorganizada e doentia. Portanto, este artigo trata da necessidade e aplicação da doutrina da separação de poderes, na forma republicana, como uma verificação dos poderes e funções do Estado administrativo.

Palavras-chave: Separação dos poderes, Direito Constitucional. Direito Administrativo, Federalismo, Originalismo, Teoria Legal.

1 Introduction

Energy in government has historically been thought of as one of the highest virtues of public service.[1] Arguably, the only pillar tantamount to energy is its cousin, stability.[2] While one may maintain that history enjoys no dearth of relics, it would appear tremendously hostile to assert the need for Federalist relics to remain boxed and waving from the past. At 81 years of age, spry and spirited, Dr. Benjamin Franklin was accosted by freshly minted citizen at the close of the Constitutional Convention. She inquired, "Well Doctor what have we got: a republic or a monarchy?" Franklin replied precisely and directly, "A republic, if you can keep it."[3]

The Framers envisioned a strict republican form of government for America.[4] Embedded within the republican form lies the separation-of-powers doctrine.[5] Indeed, the chief compliant of the Articles of Confederation was that its structure was wholly unorganized and unsound.[6] Therefore, this paper addresses the necessity and application of the separation-of-powers doctrine, within the republican form, as a check on the powers and functions of the administrative state. The theoretical basis for the separation-of-powers doctrine suggests its goal "has to do with the general tendency of certain governmental structures to result

[1] The Federalist No. 70. Considering 'energy' in the Executive, for example, Alexander Hamilton explains:
Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy[…] The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

[2] The Federalist No. 37 In determining America's future form, Publius concludes upon the republican form:
Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men: whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand.

[3] Max Farrand, *The Records of the Federal Convention of 1787, vol. 3* [1911]

[4] The Federalist No. 39: (on choosing the republican form of government) Madison declares:
It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.
Madison defines his version of the republican form as:
a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

[5] The Federalist No. 47 Using a textual understanding of the separation-of-powers doctrine, I assert that such should be strictly construed. The chief branches of government ought not commingle or mix powers. Such a separation is required to prevent the abuse of power in a single branch and provides essential accountability of each branch, respectively. Madison explains:
The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

[6] Id. In examining the constitution of the independent New Hampshire, Madison laments:
[T]here is not a single instance in which the several departments of power have been kept absolutely separate and distinct. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

in, or prevent, tyrannical government."[7] The distribution of powers and functions ought to comport strictly as provided by the Constitution: Congress legislates; the President takes care that the laws are faithfully implemented; the courts, then, are to decide on the specific applications of the law. It is argued that the "rigid separation-of-powers compartmentalization of governmental functions should be abandoned" in favor of more liberalized or progressive formulations of organizational structure.[8] While some maintain that such structural and procedural distinctions are immaterial to the function of government, I argue, vis-a-vis the separation-of-powers doctrine, that such categorizations were contemplated amongst our Founders and such limits are essential to the functions and stability of our government under the Constitution. Offering a warning regarding the mixing of governmental powers, then Tenth Circuit Judge Neil Gorsuch argued in his majority opinion, saying:

> Perhaps allowing agencies rather than courts to declare the law's meaning bears some advantages, but it also bears its costs. And the founders were wary of those costs, knowing that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.[9]

Implicit, however secondary, is the notion, as briefly argued in this paper, that there existed a blurred line where courts may be required to adopt outside tools in their interpretation of agency rules or where, more specifically to this topic, the intermeshing of formalism and functionalism frameworks.[10] I offer, consistent with the doctrine of separation-of-powers, a reinterpretation of some cases taken as the basis for analyzing the structure of government. I assert, here, that the *Auer* doctrine[11] violates, perhaps unduly, constitutional separation and integrity. Should the Court decide to reverse its position on the level of deference required to give an agency,[12] such an act limit the adjudicative and rulemaking powers of the administrative state. This paper also examines the practical structural and procedural implications of a post-*Auer* and post-*Chevron*[13] government. The reversal of those cases invites the return of the republican form and the separation-of--powers principles in so governing the agencies and the respective coordinate branches. To illustrate how the separation-of-powers doctrine provides for agency and inter-branch accountability and stability, I first analyze the functions and privileges of the Presidency.[14] Second, I emphasize the need for Congress to re-

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7 Id

8 Id at 578

9 834 F. 3d 1142.

10 This position presents a mixing of interpretive principles in reviewing agency rules—specifically, I am addressing the tools in which the court employs in reviewing an agency's decision. To illustrate the idea, I analyze the decision in *Skidmore v. Swift & Co.* where the court established the *Skidmore* doctrine as a principle of judicial review of administrative agency decisions that applies when a court defers to an agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate the thoroughness evident in its considerations, the validity of its reasoning, and its consistency with other pronouncements. In combining these factors courts will give due consideration to the agency's power to persuade. 323 U.S. 134 (1944).

11 Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 315 (2017). Professor Sunstein explains the Auer doctrine/deference is to apply when:
In the absence of a clear congressional direction, courts should assume that because of their specialized competence, and their greater accountability, agencies are in the best position to decide on the meaning of ambiguous terms.

12 The calls to reform the administrative state have been mounting. I address the implications of the reversal of the Courts doctrine in so far as they are addressed in *Kisor v. Wilkie*. I expand more on the practical effects of the opinion in the final section regarding the authority of the judiciary. In short, the recent *Kisor* decision maintains the deference entitled to the agencies.

13 The two-step doctrine promulgated by the *Chevron* decision is as follows: First, if Congress has directly spoken to the precise question at issue. If intent is clear, that is the end of the matter; for the court, and agency, must give effect to the unambiguous expressed intent of Congress. Second, if Congress has not directly addressed the question, the court does not simply impose its own construction on the statute. Rather, if silence of ambiguity exist, the court must ask whether the agency's answer is based on a permissible or reasonable construction of the statute. Thus if Congress has left a gap, implicitly or explicitly, the agency may act with its expertise. Such, then, provides that judges apply full deference to the agency. Later, I argue that this decision is contrary to the republican form and the separation-of-powers doctrine therein.

14 More specifically, I examine the use of the ancillary powers of the President: appointment powers, removal powers, and executive orders. I argue that proper employment of these powers will correct a rouge agency or branch only when essential functions are kept separate and distinct from the accumulation of powers in a coordinate branch or subsidiary, i.e. agency—Executive or independent. I further argue that the unitary executive model is the proper under the republican form and its conformity with the principles of separation-of-powers enable direct or indirect accountability each branch—Congress, Executive, and Judiciary. Simply

turn to deliberate and methodical legislating and policymaking.[15] Lastly, I examine the placement of power in the courts and their ability to exercise judicial police powers as a check on the other branches.[16] Some argue that the *Auer* and *Chevron* doctrines are necessary components to a working and efficient government.[17] This paper rejects the notion that the sweeping deference granted to administrative agencies is fundamental or necessary to government efficiency. Arguing that deference toward the agency does provide for government efficiency, Harvard law professor Adrian Vermeule contends that "for many of the same reasons that agencies are better positioned than courts to interpret the procedural provisions contained in their organic statutes, agencies are also better positioned than courts to assess the marginal costs and benefits of additional increments of procedure for program beneficiaries and regulated actors."[18] If agency deference were to be reversed, the administrative branch, as it has come to be known, does not cease all forms of life. Indeed, the agency may yet function and coexist so long as the checks of the state apparatus (congress, courts, and president) remain active and apparent. Each branch must operate at its highest capacity as provided by the constitution. Decisions congruent with *Auer* and *Chevron* induce and reduce our system to one of nonfeasance and pass on to the other without any or minimal results;[19] it is time to make the constitutional service providers embody the energy necessary to allow all to keep their republic.

2 The powers and functions of the President

2.1 The unitary executive model

In our federal system, the President derives his check and power from the implicit and explicit grants of and afforded by the Constitution. For the Framers, the unitary executive model was imperative and paramount for the maintenance of our, then, newly developed constitution. Power, as understood by the Founders, and a position sustained in this paper, must be invested in the President—the lone executive.[20] Professor Harold Bruff proffers one rationale for the Framers choice to empower a single executive: increased efficiency due to the energy and dispatch with which a unitary executive could act.[21] Apparently wary of the logical basis behind the Framers' support of the unitary executive, Bruff passively offers a single sentence noting his concerns that the benefits of the efficiency come at the cost of inter-branch commu-

stated, the shift toward commingling of powers as examined in recent judicial opinions, statutory provisions, and other forms, prevent essential accountability and is repugnant to the republican form as embodied whether directly or indirectly in the constitution.

15 To make this argument, I spend majority of the analysis analyzing empirical data of congressional oversight prior to the *Chevron* and *Auer* decisions (about 1973-1984)—I will address these cases in greater length in the section on the courts. For now, it is sufficient that you are aware of their inclusion. I exam, here, Congress's ability and powers of oversight placing them in two workable categories. First, congress's powers before the fact— "advise and consent" of the senate, deliberate legislation, i.e. "report and wait" provision, and the filibuster powers. Second, Congress's after the fact powers—the right to "review and study."

16 Generally, I assert not that the agency should not exist—although, as I take up later in this section, there is a strong fraction that insists upon the agency's unconstitutionality and need for termination. My argument does not extend toward abolishment. Rather, I argue that the controlling precedent to govern the courts ability to interpret a decision of the agency ought to be *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In this section, I argue that the court ought to be permitted to interpret agency decision, but some deference to expertise and proximity ought to be accounted for.

17 See Generally, SCOTUSblog, "The roots and limits of Gorsuch's views on *Chevron* deference," March 17, 2017; Harvard Law Review, "Essay: Deference and Due Process," May 10, 2016

18 Harvard Law Review, "Essay: Deference and Due Process," May 10, 2016

19 *Kisor v. Wilkie*, 588 U.S. ___.

20 *Supra* note 1. (Hamilton asserts that the plurality model of the executive impinges upon public opinion. He argues that under such circumstances the plurality results in a "[Loss] of efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall").

21 Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 Am. U. L. Rev. 491 (1987), *available at* https://scholar.law.colorado.edu/articles/958.

nication.[22] Bruff's assertions and concerns need not be entirely quashed. However, the purpose of the doctrine of separation-of-powers is to ensure against arbitrary encroachments of power and, at the same time, promote, properly so, governmental accountability. To that end, as Bruff notes, "to the extent that authority is allocated clearly, government efficiency increases."[23] To maintain the Constitutional structure as provided by our federalist founders, clear and consistent lines lie at the core of accountability and efficiency in government actions.

2.2 The scope and limits of the unitary executive model and the doctrine of separation-of-powers

I assert, here, that it is the ancillary functions of the President that: (1) properly, and pursuant to a textual interpretation, allow the President to generally supervise the agencies, and (2) promote full executive and inter-branch accountability. Indeed, for our founders this was no impasse. Professor Peter Strauss argues that the Executive is granted general "executive power."[24] Article II of the Constitution, as Strauss concisely and properly notes, vests in the President the following powers and/or duties:

> To appoint those "Officers of the United States…which shall be established by Law," subject to the requirements of senatorial confirmation and to the possibility that Congress might effectively limit this power to appointing "the Heads of Departments.";
>
> To "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices";
>
> "from time to time give to Congress Information of the State of the Union, and recommend to their Consideration" proposed legislation;
>
> To "take Care that the Laws be faithfully executed."[25]

Simpler still, the Vesting Clause vests power in the President, not the whole of the Executive branch.[26] While the Take Care Clause insists on the President the obligation to safeguard the faithful execution of the laws.[27] The oft-referenced rejoinder that the unitary executive principle ought not be absolute, and the President's control must be subject to checks and balances.[28] It is when powers mesh and intertwine that instability and unaccountability undoubtedly arise. The notion of checks and balance is antithetical to the core purpose of the doctrine of separation-of-powers. To restrict the unitary executive is to act in a manner repugnant to the Constitution.[29]

Considering now, the place of the independent agency's role in the unitary executive system under the

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22 Id at 508

23 Id

24 Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984)

25 Id

26 Id

27 Id

28 Id; See Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?* , 79 Fordham L. Rev. (arguing that the President does not have directive authority unless a statute expressly gives it to him ("not-so-unitary executive" or "disunitary executive" approach); See also Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *Duke Law Journal* 963-1013 (2001) (Percival explains that although he acknowledges that the President's ability to remove non-independent agency heads at will gives him enormous power to persuade them to accede to his wishes, he argues that presidential directive authority cannot be inferred from the removal power. If an agency head refuses to accommodate the President's policy preferences, there is no constitutional problem with the President removing him from office.

29 (Marshall, CJ., on powers of Judicial review: Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.) In this case, as previously stated, I tender that the Constitution contemplated the unitary executive and any unreasonable encroachment ought to the render void. 5 U.S. 137; See also *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. ___, ___ (2011) (Scalia, J., concurring) (slip op., at 1) (Justice Scalia contends that "for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of "defer[ring] to an agency's interpretation of its own regulations.").

doctrine of separation-of-powers, one is often hard pressed to locate an applicable provision in the Constitution that directly bespeaks the powers and functions of the independent agency. It is undisputed that the President ought to manifest complete control of his executive branch. What then is the place of the independent agency? Setting aim at the encroachment of power of the executive by the independent agency—specifically here, the position of the independent counsel—the late Supreme Court justice Antonin Scalia contends that Article II vest *all* executive power in the President.

> The present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that, since the statute vests some purely executive power in a person who is not the President of the United States, it is void.[30]

It is true indeed that "constitutional doctrine need not specify the exact nature of the President's fluctuating supervisory powers."[31] The principles of under the doctrine of separation-of-powers are clear and unambiguous, as Justice Scalia notes. The political implications stemming from the President's ability to terminate the head of an independent agency are of no consequence. Should the populous not assent and should congress not assent to such executive control, the remedy lies not in the usurping of constitutional integrity provided in Article II. The proper remedy to check an aggressive Executive is impeachment.[32] To test the point further, under this assertion, consider the following example. President "X" is currently being forced to surrender to public and private calls demanding him to appoint an independent counsel to investigate certain charges against the President.[33] It is not outside the scope of logic to presume that an independent agent investigating the President should be totally divorced from Executive influence. I offer this: independence is a keystone of our republican form; however, the unitary executive model does not purport to tell the independent agency *what* to do nor does the President instruct as to *how* it is to conduct their inquiry. Here, the assertion merely contends, as referenced by Justice Scalia,[34] independent checks on the President are not overcome by the President's power to remove or appoint. The check, therefore, pursuant to the separation-of-powers doctrine, is manifested in impeachment proceedings and accountability through the electoral or political processes. Such devices are textually external to the scope of judicial power.[35] Associate Justice of the Supreme Court Brett Kavanaugh explains that "independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the Framers' understanding that one person would be responsible for the executive power."[36]

In addition to the powers of the Executive to appoint and remove officers are his powers of general oversight of the administrative agency.[37] A leading opinion on the topic provides that "faithful execution of the laws enacted by the Congress ordinarily allows and frequently requires the President to provide guidance and supervision to his subordinates."[38] To command to agencies to act or to effect their oversight, the Pre-

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[30] 487 U.S. 654 (Scalia, J. dissenting).

[31] *Supra* note 22

[32] The Federalist No. 66: Here, Hamilton argues that "[I]t may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive."

[33] Consider the case of Robert Bork and the Saturday Night Massacre. See also Associated Press. Spokane Daily Chronicle. October 23, 1973. p. 14. ("... shows 44 per cent favored impeaching Nixon. Forty-three per cent opposed impeachment and 13 per cent were undecided, according to the poll…built-in sampling error of 2 to 3 per cent ..."). Nevertheless, Nixon wanted the Special Counsel terminated and the DOJ possessed such power. Here, as a result of an aggressive Executive not only did the people assent to the impeachment of the President, but congress further acted in passing the Ethics in Government Act of 1978.

[34] *Supra* note 33.

[35] Id

[36] Brett M. Kavanaugh, Separation of Powers During the Forty-Fourth Presidency and Beyond, 93 Minn. L. Rev. 1454, 1455 (2009) at 1474

[37] Bruff at 509

[38] *Building and Const. Trades Dept. v. Allbaugh*, 295 F.3d 28

sident may issue an Executive Order.[39] Professor William Hebe has noted that "since the early 1960s, when the federal government began to take an active role in civil rights, the executive order has become a tool for presidents to ensure that federal funds are not used to further racial discrimination."[40] In 1978, President Carter signed Executive Order No. 12,044, which required the agency "to adopt procedures to improve existing and future regulations."[41] The function of the Executive Order direction on power is not to create a megalomaniac President, rather the rationale considers the need for coordination and balance under the single executive. Consider this: a loose Department of Education proposes to cut eighteen million dollars allocated for the funding of the Special Olympics and amid the public rebuke, presses on.[42] Should not the President act? Indeed, he should.

3 Congress

Under the unitary executive model, the presumption that the other coordinate branches and the administrative state will cease to effectively exist is false and unfounded. Indeed, in spite of its rickety disposition,[43] the *Chevron* and *Auer* doctrines are not founding principles of our Constitutional scheme. Certainly prior to these questionable decisions, our government existed, functioned, and was more accountable, I argue, to the people and the other respective branches. Congress has resigned itself to delegating and divesting itself of its duty to write meaningful legislation for the People in favor of stump speeches and the abounding perversions of the nondelegation doctrine.[44] Here, I focus on the 1970s as a baseline to direct the heightened expectations of Congress to oversee administrative agencies.[45] Implicit in the power to oversee, in the case of Congress, reasonably presumes the heightened obligation of Congress to construct narrow and measured legislation addressing the relevant issues.

Under the Nixon administration[46] of the 1970s, to the early years of the Reagan administration,[47] Congress marked a period of heightened legislating and reasoned oversight of the administrative agencies.

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39 William Hebe, *Executive Orders and the Development of Presidential Power*, 17 Vill. L. Rev. 688 (1972) (noting the frequent use of Executive orders within the Executive Branch have been used the forward regulatory policy for both major political parties.)

40 Id

41 Federal Register Vol. 43, p. 12661, March 24, 1978. See also supra 25 at 662. (Strauss concedes that the Order—which was widely supported by the legal community—created "presidential review of mechanisms essentially procedural in natural" [and] did not direct the agency's thought processes.)

42 This example was taken from real events. In 2019, Secretary Betsy Devos announced an $18 million dollar cut to the Special Olympics. Following several additional blunders from the administrations, the President overrode the department and restore its proper funding. https://www.nytimes.com/2019/03/27/us/politics/betsy-devos-special-olympics.html

43 As I write this there is a dramatic shift toward overturning *Auer/Chevron*. Discuss trends briefly. See *Kisor v. Wilkie* 588 U.S. __ (Gorsuch, J., in the first line of his concurrence, Mr. Justice Gorsuch declares, "It should have been easy for the Court to say goodbye to *Auer v. Robbins*.").

44 In *Whitman v. American Trucking Associations,* Justice Clarence Thomas agues the "intelligible principle" standard is no longer workable and should be reconsidered.

The parties to this case who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, see *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 409 (1928), the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: 'All legislative Powers herein granted shall be vested in a Congress.' U. S. Const., Art. 1, §1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.

531 US 457 (2001)

45 It is important to note here that this model or baseline does not conform to *Auer/Chevron* as they had not be decided in that time. Here, I briefly address the courts role in these decisions, but will elaborate more in depth in the section of courts. It is enough to note the context and governing case law that would have been applicable in the 1970s and in a post-*Auer/Chevron* world, could still operate as good law and indeed, the governing doctrine.

46 President Richard M. Nixon (1969-1974).

47 President Ronald Reagan (1980-1988).

Professor James Sundquist declares that congressional control is obtained only through collective action, and even in the event of such collective action, "its controls are normally applied either before the fact or after the fact, not during."[48] Under the separation-of-powers doctrine, Congress need not feel obligated to direct the ongoing acts of the agencies—such would invade the province of the executive.[49] Yet, Congress possesses significant control over the administrative agencies that does not violate the scope of presidential power, rather serves as a check necessary for stability.

3.1 Heightened Congressional Action: before the fact

Prior to agency action and/or conception, Congress possesses plenary control over the agency, executive discretion, and in some instances, the courts. Sundquist notes that although Congress can "proscribe the processes of administration, impose restraints, [and] narrowly limit executive discretion" such, he argues, is nothing more than a "weak instrument for controlling the executive branch."[50] Contrary to Sundquist's assertions, Congress's ability to enact reasoned and thoughtful legislation minimizes the ambiguity and questions of agency duties and functions. It is Congress who breathes life and blood into the agency, and it is Congress who is imbued with the obligation to develop and mature it with care and reason. However, this is not to say that Congress must read the mind of the executive or nominee[51], rather it is enough that Congress responds to address any incongruency of intent.[52]

3.2 Advice and consent

Included in Congress's ability to act before the fact, is its ability—speaking primarily about the senate—to engage in the confirmation process. Take the obvious example, prior to becoming the nation's fourteenth Secretary of Energy, was a budding presidential candidate fighting to establish himself in a crowded field. In 2011, Perry declared that should he ascend to the Presidency he would abolish the Department of Energy.[53] In 2017, Perry was confirmed 62-37 as Secretary of Energy.[54] Here, Congress needn't inquire as to the thought processes of a nominee when one has so utterly availed themselves. However, for this system to be effective, all parts must operate deliberately.

Sundquist offers a different perspective. He asserts that beginning in the Nixon administration, committee staffs grew larger, investigations were more thorough, and hearings were long enough to engage the

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[48] Charles Roberts, *Has the President Too Much Power* (1973)

[49] The Supreme Court rejected the notion of a congressional veto in the landmark case *Immigration and Naturalization Service (INS) v. Chadha* 462 U.S. 919. Chief Justice Burger writing for the Court declared:

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I. The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President. ... We hold that the congressional veto provision in § 244(c)(2) is severable from the Act, and that it is unconstitutional.

[50] James Sundquist, The Decline and Resurgence of Congress (while he is presently discussing the confirmation process, such is applicable in this context, as he argues, to the whole of before-the-fact powers).

[51] Id (Sundquist argues that the committee is ineffective because they don't know what the potential secretary will do until after, and by then the scope of power shifts to after-the-fact)

[52] Id at 320 (No unilateral action on behalf of one house)

[53] Rick Perry once wanted to abolish the Energy Department. Trump picked him to run it., https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump

[54] Senate confirms Rick Perry as energy secretary, https://www.politico.com/story/2017/03/rick-perry-confirmed-energy-secretary-235617

public and special interests.[55] Sundquist illustrates this point noting in 1973 the Senate Commerce Committee toughened its standards relating to the agency and rejected nominees for the first time in more than two decades.[56] In a modern context, the before-the-fact control, conflicting Sundquist's assertions, yet serves as a powerful check on the agency and the President. Contrariwise, the confirmation process ought not to be used to drive policy or rulemaking.[57]

In 1987, then D.C. Court of Appeals Judge, Robert Bork was immortalized as a result of his miscarried senate confirmation hearing.[58] Here, the senate flexed with a keen investigative process and a firm confirmation hearing. Bork's confirmation was terminated and he later resigned from the D.C. court. March 16, 2016, President Obama announced the nomination of Merrick Garland to the U.S. Supreme Court. The Senate Judiciary Committee, on February 23, 2016, sent a letter to President Obama rejecting to amuse any Supreme Court nominations.[59] Another, perhaps more intricate, example of the before-the-fact powers of the senate committee center on the rejection of President Obama's nominees to the National Labor Relations Board.[60] Between 2009 and 2013, Senate Republicans exercised their filibuster ability to thwart the confirmation of the President's nominees.[61] Politically speaking, the concept is cantankerous. However, under the separation-of-powers doctrine, this is accounted for.[62] The doctrine does not seek to limit the political processes of two political branches, rather it seeks to encourage neutrality. It ought not to be lost on the viewer that in the case of Merrick Garland President Obama sought to shift political norms.[63] One rationale behind the President's actions could be to solidify a progressive hold on the High Court. His political ambition—his need for a meaningful and progressive legacy—was checked by the before-the-fact ancillary powers of Congress. The notion that pervades this study is one akin to our founders: domestic policy, under the separation-of-powers doctrine, avails itself of the constitutionally mandated fracas between Congress and the President. Contrary to Sundquist's conclusions, the before-the-fact powers are a strong block to the will and authority of the President and his administration.

3.3 Congressional Intervention: after the fact

Whereas I contend that Congress's power to act before the agency decides is great, Congress's after--the-fact powers provide few remedies to hold the agency accountable. In this section, I briefly address the powers of Congress to correct a scalawag agency by using the right to "review and study" an agency's decision.

Congress's power to act following agency action is virtually limitless. After-the-fact, Sundquist writes, "In [Congress's] oversight capacity, exercised through committees and subcommittees, the legislators can call

55 *Supra* note 52

56 Id

57 *Supra* note 36 (Justice Kavanaugh elaborates more on this issue:
The constitutional structure does not envision the Senate confirmation process of executive officials as a tool for waging policy disputes, which are more properly contested through legislation and appropriations […] But using the confirmation process as a backdoor way of impeding the President's direction and supervision of the executive branch is constitutionally irresponsible and makes our government function less effectively)

58 https://www.senate.gov/reference/resources/pdf/348_1987.pdf

59 https://www.grassley.senate.gov/sites/default/files/judiciary/upload/SCOTUS%2C%2002-23-16%2C%20member%20signed%20letter%2C%20no%20hearings.pdf

60 *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)
Employer petitioned for review of a National Labor Relations Board (NLRB) order, 2012 WL 402322, finding that employer violated National Labor Relations Act (NLRA) by refusing to reduce to writing and execute a collective bargaining agreement reached with union. Board cross-petitioned for enforcement of its order. The Supreme Court held in part that President's recess appointments, made in three-day period between two pro forma sessions of the Senate, were not valid.

61 Richard R. Levy, Recent Developments in Separation of Powers (2018) https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2018/levy-materials.pdf

62 The Federalist No. 51

63 Letter from Senator Chuck Grassley to President Barrack Obama (2016)

any official to account for any action, or lack of action."[64] It is true that Congress cannot act during an ongoing agency issue and is also subject to presidential veto. However, Congress through committee hearing, can still set right a problematic agency. For example, by 1977, committee hearings devoted the oversight rose to 34 percent.[65] While Congress is unable to directly stop an agency's active transgressions, it is empowered to bring those officers to account for the deeds. However, in the republican form, Congress may not appoint officers,[66] but it is within the province of Congress to be presented with any and all information leading to such transgressions.

4 The judicial branch and its ordered role in the separation-of-powers doctrine

This fundamental aspect of the powers and control of agencies cannot and ought not to be understated. That is, administrative agencies, in addition to making the laws and regulations, are also empowered to adjudicate and interpret the implied or express grants of Congress.[67] Such a notion is in direct conflict with the Founders' understanding of separation-of-powers. The Courts are to decide the law and interpret accordingly.[68] In this section, I examine the analysis of the *Kisor v. Wilkie*[69] decision and the future state of administrative agencies.

The strict deference afforded the agencies was formerly thought proper because of the agency's expertise and independence on policy matters.[70] This position is highly disfavored insofar as it concerns the republican form and the separation-of-powers doctrine. Justice Kagan, writing for the majority in *Kisor,* seconded the presumption of broad deference given to agencies:

> But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.[71]

The majority licenses an administrative agency to overrule the courts. It appears as if the majority fails to consider the fact that there is no need to presume or inquire as to the expectations of Congress or an administrative agency; Article III of the Constitution explicitly gives the right of interpretation to the courts. To this point, the late Justice Scalia decried the usurping of the separation-of-powers doctrine saying, "Enough is enough."[72] The majority seeks to make inquiries into the mind of Congress, but fails to recognize its ex-

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[64] *Supra* note 52

[65] Id at 328

[66] 424 U.S. 1. (The decision overturned the FECA's method for appointing FEC members as an unconstitutional delegation of power, since Congress appointed members rather than the Executive.).

[67] 5 USC § 551

[68] The Federalist No. 78 (Reminiscent of Chief Justice John Marshall's opinion in *Marbury v. Madison*, Hamilton writes, "The interpretation of the laws is proper and peculiar province of the courts." Such is the basis for arguing, as I do here, for the inappropriateness of agency adjudication)

[69] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (Veteran appealed decision of the Board of Veterans' Appeals denying him an earlier effective date for a grant of service connection for post-traumatic stress disorder (PTSD). The Supreme Court held that *Auer* deference to agencies' reasonable readings of genuinely ambiguous regulations, while cabined in its scope, retains an important role in construing agency regulations.

[70] Jamie A. Yavelberg, *The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 Duke L.J. 166 (1992) (Agency expertise was another reason to defer to interpretive rules,81 the rationale being that with the technical administration of a statute, agencies may be better equipped than courts to determine the way a statute should be interpreted and applied).

[71] 588 U.S. ___at 8.

[72] *DECKER v. NORTHWEST ENVIRONMENTAL DEFENSE* 640 F. 3d 1063 (Scalia, J.) (While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. "When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949)).

FRANCIS, Farris Lee. In Memoriam: The Republican Form and the Separation-of-Powers Among the Four Branches of Government. Revista Brasileira de Políticas Públicas, Brasília, v. 10, n. 1 p.31-42, 2020

clusive duty to "say what the law is." Such requires the courts not to sit in the position of congress, but to read and analyze the statute enacted.

Since taking office in 2016, President Trump has, via his numerous executive agencies, rolled back nearly eighty-three environmental provisions.[73] These roll backs present a unique problem. A recent report has estimated that due to these changes in policy, tens of thousands are more likely to die due to poor air and water quality.[74] Therefore, applying the majority's reasoning for deferring its judgment to the respective agency would render these roll backs permissible under *Auer/Chevron*. If the EPA was designed to "to protect human health and the environment,"[75] would not the deference given to effectuate the increase of pollutants and gases in our environment be adversative to the EPA's missions? To answer this question, a judge is not required to speculate on the intent of Congress. Indeed, *Skidmore*—a more appropriate standard—affirms the traditional rule that an agency's interpretation of the law is 'not controlling upon the courts' and is entitled only to a weight proportional to the reasoning applied.[76] Under this position, the courts would weigh the decision of the agency, but would not surrender duty to interpret the law.[77]

5 Conclusion

Kisor was decided on June 26, 2019. The deference doctrines are still far from well-settled law. In concluding his partial concurrence, Justice Gorsuch recognizes the imminent return of *Auer* and *Chevron* to be further decided. He writes, "even the fiercest defenders acknowledge that '*Auer* deference has not remained static over time' and urges the Court to continue to 'shape and refine' the doctrine."[78] The growth of the administrative state and the broad deference therein will continue to pull the republic away from the people and reject the basis upon which this country was founded. The only deference permissible under the republican form and the separation-of-powers doctrine is the cautious deference standard of *Skidmore*.

[73] https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html

[74] NYU Law report March 2019 — Climate & Health Showdown in the Courts (Replacing the Obama-era Clean Power Plan with Trump's misnamed Affordable Clean Energy plan would generate an increase in particulate matter (PM), sulfur dioxide (SO2) and nitrogen oxides (NOx) that, by 2030, could annually cause severe health effects on major portions of the population (particularly children, the elderly and other vulnerable populations), including 1,630 more incidences of premature deaths, 120,000 additional asthma attacks, and 140,000 missed school days and 48,000 lost work days).

[75] Homepage EPA.gov (last visited July 5, 2019)

[76] 588 U.S. ___ (Gorsuch, J.)

[77] Justice Gorsuch properly proclaims that "in the real world the judge uses his traditional interpretative toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law. Furthermore, he acknowledges that upon the repeal of Auer, Skidmore will govern. *See Id* at 9.

[78] *Id* at 37.

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