Can and Should the Federal Judiciary Rein In Our Expansive Administrative State?

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A Review of:

Judicial Fortitude: The Last Chance to Rein In the Administrative State, by Peter J. Wallison
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Other Views:

• Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Penn. L. Rev. 379 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9565&context=penn_law_review.

• Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097 (2004), https://academiccommons.columbia.edu/doi/10.7916/D8X34X21.

• Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017), https://scholarship.law.nd.edu/ndlr/vol93/iss4/9/.

• Ronald A. Cass, *Deference to Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State*, 19 Federalist Soc'y Rev. __ (2018), https://fedsoc.org/commentary/publications/deference-to-agency-rule-interpretations-problems-of-expanding-constitutionally-questionable-authority-in-the-administrative-state.

Conservative legal scholars have been engaged in rethinking the modern administrative state, including how its expansive reach might be constrained or reversed.[1] The most recent contribution to this intellectual ferment is Peter J. Wallison's provocative book, *Judicial Fortitude: The Last Chance to Rein In the Administrative State*. As its title suggests, this book advocates a recalibration of our Constitution's structural separation of powers under which the federal judiciary would constrain the excesses of administrative agency powers.[2] Wallison concludes that Congress has been derelict in its responsibility to perform this critical task.[3] He recommends that the judiciary act to protect the reservation of exclusive lawmaking responsibility to Congress by prohibiting agency efforts to resolve legislative issues.[4] Otherwise, he fears that there will be more power "concentrated in a faceless bureaucracy" and a resulting loss of public confidence in the democratic processes that govern our society.[5]

Wallison is a Senior Fellow at the American Enterprise Institute in Washington, D.C. In addition to having practiced law in Washington, D.C. and New York City, Wallison brings to this book an extensive resume of government experience. From 1974 to 1976, he was counsel to then-Vice President Nelson Rockefeller; from 1981 to 1985, he was General Counsel of the Department of the Treasury; and from 1986 to 1987, he was White House Counsel for President Ronald Reagan.

Wallison's concern is two-fold. First, he contends that Congress has failed to place sufficient limits on the exercise of powers it delegates to administrative agencies, with the result that unaccountable agencies enact and enforce rules that profoundly impact our society and national economy.[6] Second, Wallison asserts that the judiciary has "largely surrendered its constitutional duty to determine the scope of administrative discretion."[7] As a consequence of these developments, he says, "we risk losing our democracy unless we can gain control of the agencies of the

1 *See. e.g.*, Philip Hamburger, The Administrative Threat (2017), Joseph Postell, Bureaucracy in America, The Administrative State's Challenge to Constitutional Government (2017).

2 Peter J. Wallison, Judicial Fortitude, The Last Chance to Rein in the Administrative State ix-x, xxv, 29, 161 (2018) (hereinafter *Wallison*).

3 *Wallison* at xiv-xvi, 39-52.

4 *Id.* at 147, 149-50.

5 *Id.* at xix, 165-66.

6 *Id.* at ix, 50-54.

7 *Id.* at ix.

administrative state."[8] In *Judicial Fortitude*, Wallison develops these themes.

I. The Framers' Vision of Limited Government Under the Rule of Law, and How that Vision Has Been Weakened and Compromised

The starting point for Wallison's book is his judgment that the Framers' original design of a national government of limited powers, acting within the confines of the rule of law, has been weakened by the modern administrative state.[9] The Framers of the Constitution had the "paramount goal" of preserving liberty for the American people, and crafting a government of limited powers was central to that objective.[10] A strict separation of powers was intended to preclude the tyranny that James Madison said would be effected by an "accumulation of all powers, legislative, executive and judiciary, in the same hands."[11] That structure also enables each of the three branches to check the powers of the others.[12]

According to Wallison, the nation's founders intended that the courts would function as guardians of the Constitution's structure and therefore of the people's liberties; in the context of administrative agency interpretation of congressional language, he says, the courts need to guard against unwarranted expansions of agency power.[13] For Wallison, agency expansions of their own authority under the guise of statutory interpretation undermine the separation of powers and "seriously impair the rule of law."[14] Madison, he notes, warned against the dangers of an "inconstant government," under which the citizen (whether a "prudent merchant," or a farmer or manufacturer) could not plan or invest in the face of arbitrary government power.[15] Under the circumstances, Wallison argues, the courts must exercise their authority "to determine and declare when either of the other branches steps outside its assigned role under the constitutional separation of powers."[16]

Agencies, Wallison argues, should not move "beyond the task of administering or enforcing the law into the role of making law, reserved by the Constitution to Congress," but a number of agencies have done so.[17] Wallison devotes an entire chapter to what he characterizes as examples of agency overreach.[18] For example, in 1996, the Food and Drug Administration (FDA) claimed that tobacco was a "drug" that fell under its jurisdiction to regulate; this position was a reversal of a previous FDA position and was inconsistent with legislation Congress had enacted.[19] The Supreme Court held that the FDA lacked the authority to declare tobacco a drug and therefore regulate it.[20] Similarly, in 2014, in *Utility Air Regulatory Group v. Environmental Protection Agency*, the Supreme Court determined that the EPA had engaged in an impermissible interpretation of the Clean Air Act in its regulation of carbon dioxide emissions.[21] Wallison also cites efforts by Richard Cordray, the Director of the Consumer Financial Protection Bureau during the Obama Administration, to enforce the Dodd-Frank Act's prohibition of abusive acts and practices in consumer finance activities by bringing enforcement actions rather than by undertaking rulemaking proceedings.[22] Wallison characterizes the agency's reliance on enforcement actions without an underlying set of rules as a "derogation of the rule of law," and he observes that a regulated firm "can have no idea what activities might constitute abuse and thus no way to modify its behavior."[23] Wallison provides several other examples of what he considers to be agency overreach.[24]

In a separate chapter, Wallison traces much of the expansion of agency authority in the twentieth century to the ideology of the Progressive movement of the late nineteenth and early twentieth centuries, which developed and advocated views on the Constitution and limited government that were sharply different from those of prior generations.[25] For example, in 1887, Woodrow Wilson, then an academic, rejected the separation of powers principle as inefficient, even calling it a "radical defect."[26] For the Progressives, the rapid changes in the nation's economy and society after the Civil War, marked by dramatic increases in corporate power and urban poverty, demanded aggressive government action outside existing constitutional structures.[27] Wallison contends that the Progressives were mistaken in concluding that our constitutional system had to be modified to accommodate the rapid societal changes, but their faith in public administration by unelected, disinterested experts nevertheless prevailed.[28] With the onset of the Great Depression, President Franklin D. Roosevelt and his New Deal allies carried forward the Progressives' political ideas to expand the reach of the administrative state to a wide

8 *Id.*

9 *Id.* at xviii-xxii, 19-21.

10 *Id.* at 23.

11 *Id.* (citing The Federalist No. 47 (James Madison)).

12 *Id.*

13 *Id.* at 28-29.

14 *Id.* at 34.

15 *Id.* (citing The Federalist No. 62 (James Madison)).

16 *Id.* at 24-25.

17 *Id.* at 2.

18 *Id.* at 2-19.

19 *Id.* at 17.

20 Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155-59 (1997).

21 573 U.S. __, 134 S. Ct. 2427, 2445 (2014).

22 *Wallison* at 2-4.

23 *Id.* at 3.

24 *Id.* at 4-9 (criticizing the Department of Education's reliance on issuing guidance and interpretative letters in its oversight of Title IX of the Education Amendments of 1972 as evading the rulemaking process); *id.* at 9-11 (criticizing agencies' use of directives to get banks to cease making loans to payday lenders).

25 *Id.* at 55-75.

26 *Id.* at 56-57 (citing Woodrow Wilson, Congressional Government in the United States 284 (1911)).

27 *Id.* at 57-59.

28 *Id.* at 58-61, 62-63.

variety of economic and social problems.[29] Although some Progressive thinkers were hesitant about letting agencies control economic regulation—especially given that some regulated entities were able to secure protections from agencies and unduly influence them, which Wallison calls "clientism" and others call "regulatory capture"—the executive agencies nevertheless succeeded in regulating many industries.[30] Wallison also observes that the Supreme Court gradually embraced Progressive views on the central role of administrative agencies in governing private conduct largely free of court interference.[31]

Judicial Fortitude also questions whether the modern administrative state has yielded the benefits that its supporters have touted.[32] Wallison asserts that the American economy "is saddled with a huge number of unnecessary regulatory and administrative restraints" that are legacies of the Progressive movement and the New Deal.[33] He also says that most of our economy functions "quite well" without significant government regulation, and that the regulated part of the economy "often functions very poorly in comparison with the parts that are not regulated."[34] Wallison contends, for example, that the nation's banking system has been overregulated, and he criticizes the Dodd-Frank Act as creating a new round of burdensome regulations on the financial system, resulting in a significant drag on economic growth.[35] He also points to the successful deregulation of various industries (such as airlines and railroads) as evidence of the superiority of the market over burdensome regulation.[36] Wallison also cites various statistical studies in support of his contention that regulatory costs impair economic growth. An April 2016 study determined that the cumulative cost of regulations between 1980 and 2012 seriously dampened economic growth (by 25 percent); this meant that each person in the United States was nearly $13,000 poorer in 2012 than he or she would have been without the additional regulations.[37] Finally, Wallison invokes public choice theory, which maintains that regulators have their own interests that they seek to advance, sometimes at the expense of the public good for which they are theoretically acting.[38]

Wallison acknowledges that some commentators think there is "little alternative" to our strong administrative state because of the complexity of the American economy.[39] But, he replies, that avoids the fundamental question of whether agencies have unconstitutionally arrogated powers to themselves and thereby imperiled our liberties.[40] Wallison also acknowledges the concern of some writers that agencies must enact regulations to address problems in our dynamic economy because Congress is a "cumbersome body that moves slowly in the best of times."[41] Wallison replies that this response fails to consider how the public wants to be governed and whether agencies have either the legal or moral authority to prescribe rules for society.[42]

II. How Congress' Dominance of Our National Government Has Receded

Congress dominated the federal government from the nation's founding through the Civil War period, although Wallison acknowledges that President Lincoln assumed broad powers to conduct that war.[43] Wallison also argues that some decline in congressional influence occurred even earlier in the nineteenth century, when Martin Van Buren organized slates of Democratic Party members as electors pledged to vote for him for president, thereby creating a new organizational principle that undermined the role of the House of the Representatives in the electoral system.[44] But Congress' independence was undermined more severely in the twentieth century when presidents like Franklin D. Roosevelt and Lyndon B. Johnson benefitted from landslide election victories and then enlisted the help of Democratic-controlled Congresses to enact their economic and social welfare programs.[45] Party loyalties in Congress, Wallison observes, have "easily overcome" the Framers' understanding that Congress would be independent of the president and vice versa.[46]

The erosion of congressional independence means that Congress does not reliably hold the presidency—including executive branch agencies—accountable, and that during periods of one-party power, the agencies can expand their reach and discretion unhindered.[47] Accordingly, Wallison believes that it is unrealistic for conservatives to expect Congress to restrict agencies' exercise of authority.[48] Wallison acknowledges that the Trump Administration has used the Congressional Review Act to overturn some regulations promulgated during the Obama Administration, but he is skeptical that the Act is a sufficiently robust vehicle to

29 *Id.* at 65-68.

30 *Id.* at 68-70.

31 *Id.* at 72-74.

32 *Id.* at 77-108.

33 *Id.* at 81.

34 *Id.* at 79.

35 *Id.* at 86-88, 90-91.

36 *Id.* at 102-105.

37 *Id.* at 92-95 (citing Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, *The Cumulative Cost of Regulations*, Mercatus Working Paper, April 2016, https://www.mercatus.org/system/files/Coffey-Cumulative-Cost-Regs-v3.pdf).

38 *Id.* at 101.

39 *Id.* at 30.

40 *Id.* at 30-31.

41 *Id.* at 74-75 (citing Emily Bazelon and Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. Times (April 1, 2017)).

42 *Id.* at 75.

43 *Id.* at 39-40.

44 *Id.* at 41-42.

45 *Id.* at 42-43.

46 *Id.* at 43.

47 *Id.* at 43-44.

48 *Id.* at 44-45.

restrict agency power.[49] Wallison also acknowledges that various bills have been introduced that would require "major" rules to be referred to Congress for approval or disapproval, but he notes that, to date, those bills have not yet been enacted into law.[50]

III. The Demise of the Nondelegation Doctrine and Hope for its Revival

At the center of *Judicial Fortitude* is an examination of the nondelegation doctrine and the serious problems posed to our constitutional government by its decline over time.[51] The doctrine "mandate[s] that Congress generally cannot delegate its legislative power to another Branch."[52] That is because Article I of the Constitution vests the authority to enact legislation exclusively in Congress.[53] Wallison traces this doctrine back to John Locke's *Second Treatise of Government,* which influenced the nation's founders to ground the Constitution in the people's transfer or delegation to the government of their inherent and natural right to govern themselves.[54] The people's delegation of lawmaking authority could not be subdelegated by Congress absent a constitutional amendment because Congress is the agent of the people and cannot exceed its principal's instructions.[55] That restriction is consistent with James Madison's concern, expressed in *Federalist* No. 47, that separation of powers is necessary to avoid the "tyranny" caused by the consolidation of powers in one of the branches.[56]

Because of the "exclusive nature" of the Constitution's grant to Congress of "all legislative power," some legal scholars believe that it is a violation of the Constitution when Congress transfers or delegates *any* of its legislative authority to administrative agencies.[57] Other scholars conclude that some delegation is inevitable given the complexities of our modern society.[58] But Wallison responds that there is "very little evidence today" that it is necessary to accept broad delegations of congressional authority. Whatever necessity might have existed during the New Deal or Progressive eras to address the country's "unprecedented" problems, our experiences with many failures of agency governance require at least "substantial evidence" that our constitutional structure cannot manage our contemporary problems just as well, and without the danger of abuse that comes with unaccountable and consolidated government power.[59]

Wallison contends that the nondelegation doctrine "protects and preserves" Congress' responsibility to make the "most important" decisions for society.[60] If Congress were permitted to delegate that exclusive authority to administrative agencies, the separation of powers would be a "nullity," and the dangers to our liberty that the Framers feared would become a reality.[61] Major decisions affecting society would be made by the "unelected bureaucracies of the administrative state," not the people's representatives.[62]

The courts, however, have not rigorously applied the nondelegation doctrine in recent decades; in fact, the Supreme Court has not applied the doctrine to invalidate an agency action since 1935.[63] In *Panama Refining Co. v. Ryan*, decided that year, the Court held that a provision of the National Industrial Recovery Act (NIRA) that granted the president power to prohibit the sale of certain oil products constituted an improper delegation of legislative power.[64] In the same year's *A.L.A. Schechter Poultry Corporation v. United States*, the Court struck down a different NIRA provision that authorized the president to establish "codes of fair competition," reasoning that Congress' failure to define "fair competition" rendered the provision an improper delegation of legislative power.[65] Nine years later, in *Yakus v. United States*, the Court—by a six to three vote—upheld the authority of the Price Administrator of the wartime Office of Price Administration to set maximum prices for commodities and rents throughout the country at a "generally fair and equitable" level to effectuate the statute's objectives.[66] The Court found that "Congress has stated the legislative objective, has prescribed the method of achieving that objective," and has "laid down standards to guide the administrative determination in exercising the delegated authority."[67] It distinguished *Schechter Poultry* as a case in which no standards had been defined and the development of prices had been delegated to private entities.[68]

In 2001, in *Whitman v. American Trucking Association*, the Court articulated its understanding of the nondelegation doctrine's continued relevance: when Congress confers decision making authority upon agencies, Congress must "lay down by legislative act an intelligible principle to which the person or body

49 *Id.* at 45-46.

50 *Id.* at 46.

51 *Id.* at 109-36.

52 Mistretta v. United States, 488 U.S. 361, 371-72 (1989).

53 *Id.*

54 *Wallison* at xi, 112 (citing John Locke, Second Treatise of Government (1689), *available at* https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf).

55 *Id.* at 112-13.

56 *Id.* at 113 (citing The Federalist No. 47 (James Madison)).

57 *Id.* at 110 (citing Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) (see especially page 351 for an exposition of that issue)).

58 *Id.* (citing Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097 (2004): Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 6 (2017)).

59 *Id.* at 110-11.

60 *Id.* at 111.

61 *Id.*

62 *Id.*

63 *Id.* at 115.

64 293 U.S. 388, 415-20 (1935).

65 295 U.S. 495, 536-42 (1935).

66 321 U.S. 414, 426 (1944).

67 *Id.* at 423.

68 *Id.* at 424.

authorized to [act] is directed to conform."[69] Wallison describes this intelligible principle test as "meaningless," and he contrasts it with Chief Justice Marshall's articulation of the boundaries of Congress' Article I authority in *Wayman v. Southard*, where he drew a line separating "those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."[70] Wallison restates the holding of *Wayman*: Congress must make the "important" decisions, but it can delegate the details of their execution to the agencies or the courts, with the exercise of discretion "confined by the general terms set by Congress."[71] The modern nondelegation doctrine has strayed far from this principle.

Wallison opines that, although the nondelegation doctrine is not dead, little of its substance remains in modern Supreme Court jurisprudence.[72] He criticizes the Supreme Court for failing to challenge legislation that "hands open-ended legislative authority" to agencies, calling this a "serious failure" of the judiciary to perform its constitutional duties.[73] He contends that the failure to apply a vigorous nondelegation doctrine is the single most important reason for the administrative state's uncontrolled growth, for the judiciary thereby enables Congress to delegate to agencies broad rulemaking powers.[74]

Wallison also summarizes the views of various legal commentators who have explored the rationale and validity of the nondelegation doctrine, including writings by supporters of the administrative state.[75] He disagrees with scholars who contend that the president can function as an independent check on administrative agencies.[76] Wallison states that it is "fanciful" to think the president alone has the capacity to monitor the thousands of rules issued by agencies each year, and that even then a president cannot "legitimize" an unconstitutional delegation of authority.[77]

What then is the future of the nondelegation doctrine? Wallison detects some "stirrings" at the Supreme Court that indicate that some Justices would like to reexamine the intelligible principle test and attempt a reformulation of the doctrine.[78] Justice Clarence Thomas, for example, remarked in his *Whitman* concurrence that, in a future case, he would be willing to consider "whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[79] In a subsequent case, Justice Thomas observed that the Supreme Court had "too long abrogated our duty to enforce the separation of powers required by our Constitution" and had sanctioned an expansive administrative state that makes and enforces laws without accountability.[80] Wallison also notes that both Chief Justice John Roberts and Justice Samuel Alito have expressed concerns about the broad reach of the administrative agencies,[81] and that then-Judge Neil Gorsuch expressed concern about applying the nondelegation doctrine in a Tenth Circuit case.[82] Justice Brett Kavanaugh also has said that, when an agency "wants to exercise expansive regulatory authority over some major social or economic activity," Congress "must clearly authorize" the agency to take such a "major regulatory action."[83] Wallison concludes that, until the Supreme Court undertakes the task of reviewing the nondelegation doctrine, the doctrine remains "in limbo."[84] He warns that, so long as Congress continues to enact "goals-oriented" legislation, the courts will continue to confront the nondelegation problem, and he urges the courts to make Congress accountable for its constitutional responsibilities.[85]

IV. Should the *Chevron* Doctrine be Abrogated?

Wallison is also concerned by the way the *Chevron* doctrine has expanded agency authority;[86] he characterizes *Chevron* as an

69 531 U.S. 457, 472 (2001).

70 *Wallison* at 116-17, 121, 128 (citing Wayman v. Southard, 23 U.S. 1, 42-45 (1825)).

71 *Id.* at 119-20.

72 *Id.* at 126-28. Wallison notes that, as early as *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), the Court "took a major turn away" from the *Wayman* decision by articulating the "intelligible principle" test. *Wallison* at 120-21.

73 *Wallison* at 134.

74 *Id.*

75 *Id.* at 128-33.

76 *Id.* at 133 (citing Adrian Vermeule, *What Legitimacy Crisis?*, Cato Unbound (2016), https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis).

77 *Id.* at 128-32, 132-33.

78 *Id.* at 134-36.

79 *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

80 U.S. Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 1254 (2015) (Thomas, J., concurring).

81 *Wallison* at 109, 135 (citing City of Arlington, Texas v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., Kennedy and Alito, JJ., dissenting) (opining that "the danger posed by the growing power of the administrative state cannot be dismissed")).

82 *Id.* at 136 (citing United States v. Nichols, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of petition for rehearing en banc), *rev'd on other grounds*, 136 S. Ct. 1113 (2016)). This case involved a statute granting the Attorney General broad discretion to define the applicability of a sex offender registration requirement; the same statute is the subject of a pending Supreme Court case. *See* Gundy v. United States, No. 17-6086. *See also Gundy v. United States*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/gundy-v-united-states/; Matthew Cavedon and Jonathan Skrmetti, *Party Like It's 1935?:* Gundy v. United States *and the Future of the Non-Delegation Doctrine*, 19 Federalist Soc'y Rev. __ (2018), https://fedsoc.org/commentary/publications/party-like-it-s-1935-gundy-v-united-states-and-the-future-of-the-non-delegation-doctrine.

83 *Wallison* at 136 (citing United States Telecomm. Ass'n v. FCC, 855 F.3d 381, 421 (2017) (Kavanaugh, J., dissenting from denial of petition for rehearing en banc)).

84 *Id.*

85 *Id.*

86 *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (stating that courts are to defer to an agency's interpretation of ambiguous congressional language if it is based on a permissible construction of the statute).

"easy delegation doctrine"[87] that has resulted in law- and policy-making by unelected administrators.[88] Wallison does not appear to disagree with step one of the *Chevron* analysis—in which courts determine whether Congress has "directly spoken to the precise question at issue"—but he disagrees with the Court's subsequent statement that, if a congressional delegation to an agency on a particular question is "implicit," the reviewing court cannot substitute its own construction of the statutory provision for a reasonable interpretation made by the agency.[89] Wallison says that this enables agencies to "infer powers that Congress has not explicitly granted as long as that inference is 'reasonable.'"[90] Wallison also criticizes portions of *Chevron* in which the Court indicates that agencies may resolve ambiguities in a statute that have resulted from Congress' failure to resolve an issue due to competing interests, as well as the Court's observation that agencies, while not "directly accountable to the people," are accountable via their supervision by the elected president.[91]

Wallison rejects the "fiction" that agency decisions are inevitably the consequence of presidential or administration policy, and he contends that the Court has improperly downgraded the role of Congress in deciding policy questions by requiring deference to agency authority when Congress has not resolved an issue.[92] This wide deference is a "virtual nullification of the separation of powers," under which Congress becomes merely a source of powers for the agencies rather than a legislative body that decides policy issues for our nation.[93] Wallison argues that it is Congress' exclusive role to reconcile conflicting interests and determine resulting policies, that such policies should be reviewable by courts only on constitutional grounds, and that it is not the role of the "federal bureaucracies" in Washington to substitute for Congress' authority as legislator.[94] *Chevron*, he contends, permits agencies to displace Congress in our constitutional structure.[95] Finally, insofar as *Chevron* means that a court must defer to the agency's interpretation, that deference compromises the court's independent judgment, "biasing" it in favor of the agency position.[96] Such deference is inconsistent with the court's obligation, emphasized by Chief Justice Marshall in *Marbury v. Madison*, to state "what the law is."[97]

Wallison recalls Chief Justice Marshall's statement in *Wayman v. Southard* that Congress is to decide "important issues," and he argues that agencies should only make policy decisions that are "not important enough" to be made by Congress; even then, he argues, agencies should only make such minor decisions when authorized by Congress to do so.[98] While recognizing that the Supreme Court has yet to reexamine the *Chevron* doctrine, Wallison discerns in some Justices' statements a willingness do so, just as those Justices have expressed concern about the decline of the nondelegation doctrine.[99]

V. Is Judicial Fortitude the Solution to an Expansive Administrative State?

Wallison concludes his book by arguing that the judiciary must assume—or resume—its assigned constitutional role of ensuring that our constitutionally mandated separation of powers is maintained.[100] He contends that the Framers contemplated that the judiciary not only would interpret the Constitution's language, but would act to preserve our constitutional structure.[101] Alexander Hamilton declared in *Federalist* No. 78 that the judiciary would be "faithful guardians" of the Constitution and the "citadel of the public justice and the public security," and he also warned that the judiciary must remain independent and not become unified with the Congress or the president.[102] Wallison warns that the Framers' design of a system in which Congress itself legislates will become obsolete unless the courts intervene.[103] The courts thus need to revitalize the nondelegation doctrine as it existed before the New Deal Supreme Court retreated from that task.[104] Otherwise, Congress' role as the "exclusive source"

87 *Wallison* at 137.

88 *Id.* at 140-41. *See Chevron*, 437 U.S. at 843-44 (deferring to the EPA's construction of a statutory term insofar as the term was ambiguous and the agency's interpretation was "permissible").

89 *Wallison* at 138 (citing *Chevron*, 437 U.S at 843-44).

90 *Id.* at 138.

91 *Id.* at 140 (citing *Chevron*, 437 U.S. at 865).

92 *Id.* Wallison notes that only a few "major" rules are brought to the attention of the Office of Management and Budget, an agency that is within the Executive Office of the President, and that over 12,000 regulations are issued during a typical presidential term. *Id.* at 143.

93 *Id.* at 141.

94 *Id.*

95 *Id.* at 144.

96 *Id.* at 146 (citing Philip Hamburger, *Gorsuch's Collision Course with the Administrative State*, N.Y. Times (March 20, 2017)). My review does not examine whether a court's application of *Chevron* deference materially affects the outcome as resulting in a pro- or anti-agency decision. *See* Kristin E. Hickman, *SOPRA? So What? Chevron Reform Misses the Target Entirely*, 14 U. St. Thomas L.J. 580, 590 (2018) (noting the division of opinion on this issue); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103, 120-22 (2018) (citing author's research that identifies the impact of *Chevron* deference as to favorable outcomes for the agency interpretation).

97 *Wallison* at 138-39 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

98 *Id.* at 142.

99 *Id.* at 150-58 (citing *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., Kennedy and Alito, JJ., dissenting); Perez v. Mortgage Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring) (asserting that principles of deference to agency interpretations are inconsistent with the independent judicial decision making embodied in Article III)). *See also* Gutierrez-Brizuela v. Lynch. 834 F.3d 1142, 1154-55 (10th Cir. 2016) (Gorsuch, J., concurring) (expressing concerns about *Chevron* deference).

100 *Wallison* at 147-50, 161.

101 *Id.* at 147.

102 *Id.* at ix-x, 137, 146, 165 (citing The Federalist No. 78 (Alexander Hamilton)).

103 *Id.* at 147.

104 *Id.* at 147, 149.

of legislation for our national government will be undermined, and our liberty will be threatened.[105]

Wallison also recommends that the Supreme Court revisit the *Chevron* doctrine.[106] Borrowing again from Chief Justice Marshall's opinion in *Wayman v. Southard*, Wallison suggests that courts should evaluate an agency's interpretation of a statute by whether the agency is addressing a "detail" or an "important decision."[107] The courts, he contends, also must engage in a more searching manner when they interpret agency decisions. First, if there is a lower court decision based on insufficient evidence of Congress' intent, the appellate court can remand the case to obtain a "further determination" of what Congress intended.[108] Second, if the court confronts a truly ambiguous statute and the agency has tried to reconcile competing interests in its interpretation, the court can state that it wants a "clearer statement" from Congress before the regulation is enforced, or it can remand the regulation to the agency, "requiring it to put the unresolved question before Congress for a vote"; Congress could enact a procedure to enable such requests.[109] Alternatively, the agency could declare to Congress its intention to adopt a certain interpretation of an ambiguous statute and, if Congress does not act within a specified time period, the agency's interpretation would be "deemed correct" by the courts.[110]

Whatever system is adopted, the result would be a "disciplinary system" for Congress, which would avoid issues of improper delegation or inappropriate levels of deference.[111] If courts were to send disputed issues of statutory interpretation back to Congress, then Congress would decide that it should resolve the ambiguities and avoid both the problems of *Chevron* deference and additional litigation on that question.[112] Wallison acknowledges that Congress may find it difficult to reach agreement on controversial issues, but he asserts that it is better to endure "gridlock" than to delegate important decisions to unelected agency officers.[113]

Wallison acknowledges that some conservatives, including the late Justice Antonin Scalia, were advocates of judicial restraint, having witnessed the Supreme Court's activism in areas of social policy.[114] He responds that the decisions that concerned Justice Scalia were based on the Court's interpretation of the Constitution's "words," not the Court's role in preserving the Constitution's structure.[115] In addition, the Court engages in limited, "rational basis," review of Congress' regulatory statutes, so a "high hurdle" necessarily exists for competing interests to challenge such laws successfully.[116]

VI. Are Wallison's Proposed Reforms Realistic or Appropriate?

Wallison's recommendation that that the federal judiciary "rein in" the administrative state raises several questions. His primary objective is to shift the dynamic of decision making from administrative agencies to Congress through both increased judicial intervention against delegations of congressional authority and revocation of *Chevron*.[117] But will increased judicial review of agency decisions—to limit agency law- and policy-making—ultimately result in Congress performing that role more effectively by enacting more detailed, less ambiguous legislation? And will increased judicial review of agency decisions invite more legislating from the bench?

In considering the first question, we might also ask whether the courts can reliably apply Chief Justice Marshall's distinction between "important questions" and "details" when deciding what constitutes an improper delegation of congressional authority. One judge's "detail" could be another judge's "important question." Litigants, through evidence in the rulemaking record, might be able to identify some demarcation, perhaps relying on estimates of economic or social costs or environmental impact. Whatever test is employed, a court must be satisfied that the statute in question actually empowers the agency to act, and it may be reasonable for courts to adopt limiting constructions of statutes if they doubt the existence of that authority.[118] Congress then would have to step in and decide the issue directly in subsequent legislation. We may get some enlightenment on these questions if the Court addresses the nondelegation problem at issue in the pending *Gundy* case.[119]

If the court decides that there has been an unlawful delegation, how should the defect be remedied? Wallison recommends a simple remand by the court to the agency, which would limit the extent of judicial intervention and appropriately refer the issue to the agency.[120] But while that inquiry is pending, will the litigation be held in abeyance? And although Wallison suggests that the agency can ask Congress to vote on the

105 *Id.* at 149.

106 *Id.* at 158-60. The Supreme Court recently granted certiorari to review whether courts must defer to an agency's interpretation of one of its own ambiguous regulations under *Auer v. Robbins,* 519 U.S. 452, 463 (1997) and *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945). *See Kisor v. Willkie*, No. 18-15. *See also Kisor v. Willkie*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/kisor-v-wilkie/.

107 *Wallison* at 158-59.

108 *Id.* at 159.

109 *Id.*

110 *Id.*

111 *Id.* at 160.

112 *Id.* Wallison expresses some confidence that Congress can address and resolve complex issues, delegating only "technical matters" to the agencies. *Id*. at 163.

113 *Id.* at 164.

114 *Id.* at 148-49.

115 *Id.* at 149.

116 *Id.* at xxii-xxiii.

117 *Id.* at 111, 134-35.

118 *See* C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619, 623-25, 646 (2015) (recommending that courts monitor potential agency overreach through careful review of purported agency authority and construe statutes narrowly to avoid such overreach).

119 *See supra* note 82.

120 *Wallison* at 159.

unresolved question, will that new process create a "backlog" of pending inquiries? Will Congress prioritize the requests?[121]

With respect to the delegation problem, can we reasonably expect Congress to legislate in detail on matters as diverse as ratemaking, the licensing of broadcast stations, defining unfair or deceptive industry practices, or complex scientific or technical issues involved in safety or environmental regulations?[122] Might a more prudent course be to focus Congress' oversight function on its reviewing proposed major rules promulgated by agencies before the rules can become effective? These may be more effective—because more feasible—means of policing agency overreach.[123]

Similar problems may arise if the courts abandon *Chevron* and undertake de novo statutory review of ambiguous statutory provisions.[124] If a court concludes that a statute is ambiguous, will the court resolve the ambiguity, or will it remand to the agency or Congress for additional consideration of the issue? The more appropriate course would be for the court to avoid providing its own interpretation—and thus avoid its own overreach—but to instead demand a better explanation from the agency. But in cases in which Congress has not addressed an inadvertent ambiguity in a statutory provision, the agency on remand may not necessarily have additional insight to provide to the court. In those situations, Congress alone could resolve the ambiguity. But there may be situations in which Congress did not intend to legislate with specificity, purposely relying on the agency's expertise to address and resolve the question.[125]

The central challenge of separation of powers is to create an appropriate equilibrium between Congress and the executive branch, while ensuring that the judiciary remains the branch "least dangerous to the political rights of the Constitution."[126] Wallison wants the courts to enforce the Constitution's structural protections, but he is understandably leery of the courts extending their reach to resolve broader issues.[127] I also am concerned that increased judicial scrutiny of agency interpretations of statutes could result in judges replacing agency administrators as de facto legislators. Judicial ideologies might supplant agency decision making, and while career officials are not at-will employees, they also do not have life tenure like federal judges do. There is some basis to conclude that judges might be freer, absent *Chevron*, to overreach.[128] Whether our judiciary is progressive or conservative ideologically, are we comfortable with the judiciary determining the legal contours of our civic and economic arrangements? Notwithstanding these concerns, Wallison has framed the nondelegation and *Chevron* deference issues in an eloquent and reasoned way, and he has made a valuable contribution to the ongoing debate on those doctrines.

121 *See* Robert R. Gasaway, Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 Geo. Mason L. Rev. 361, 395-96 (2017) (recommending that Congress "bind itself to taking legislative action (even if the action is an affirmative decision not to act)" in various administrative law contexts, including "fast track" proposals on agency-submitted proposals to modify rules governing exercises of agency discretion, or agency responses to Supreme Court decisions holding legislation unconstitutional on non-delegation grounds).

122 *See* Nicholas R. Bednar, Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1454 (2017) ("Congress routinely delegates authority to agencies because it wants to utilize their policy and scientific expertise to resolve programmatic details and fill statutory gaps").

123 For an example of a pending bill on that topic, see H.R. 26, the *Regulations from the Executive In Need of Scrutiny Act*, 115th Cong., 1st Sess., https://www.congress.gov/115/bills/hr26/BILLS-115hr26rfs.pdf. The bill states that "major rules" would not have legal effect until Congress passes (and the President signs) a joint resolution approving the rules.

124 For an example of a pending bill on that topic, see H.R. 76, the *Separation of Powers Restoration Act of 2017*, 115th Cong., 1st Sess., https://www.congress.gov/bill/115th-congress/house-bill/76/text. The bill would amend section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, to provide that courts would review all relevant statutory questions de novo. *See* Bednar and Hickman, *supra* note 122, at 1456-58 (critiquing these proposed reforms).

125 *See* Richard J. Pierce, *The Future of Deference*, 84 Geo. Wash. L. Rev. 1293, 1313 (2016) (the elimination of deference doctrines would come at a "very high cost" in terms of the failure to recognize the agencies' "superior knowledge of the field and superior understanding of the ways in which an interpretation of a statute affects the ability of the agency to implement a coherent and efficient regulatory regime").

126 *See* The Federalist No. 78 (Alexander Hamilton).

127 *Wallison* at 82, 147-19.

128 *See* Kent Barnett, Christina L. Boyd, and Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 Vand. L. Rev. 1463, 1467, 1524 (2018) (describing empirical research on the application of *Chevron* to over 1,500 circuit court cases over 11 years (2003-2013) and concluding that *Chevron* deference "has a powerful constraining effect on partisanship in judicial decisionmaking").