

Looking Forwards by Looking Back: John Locke's Second Treatise and Modern Administrative Law Implications

Introduction

In his 1689 Second Treatise on Civil Government, John Locke famously asserted a libertarian view of the proper role of government. He declared: “The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property” (Locke). Operating within Locke’s narrow definition of a limited government, this essay maintains, perhaps counterintuitively, that libertarians should desire the passage of more – not fewer – laws to preserve personal liberty and popular sovereignty.

I begin by defining “too many” for purposes of this discussion. Based on Locke’s view of government as existing to protect property, even staunch libertarians recognize the importance of a government providing for the general stability and security that allow business to flourish and an adversarial system for adjudicating private rights. Accordingly, libertarians would define “too many laws” as government regulations so burdensome and all-encompassing that they unduly restrict and undermine individual freedom. Given this reality, it would seem second nature that fewer laws would advance libertarian interests. This simplistic thinking ignores the restrictions on personal liberty resulting from administrative regulations instead of legislative action.

The United States as a Case Study

Having established this framework, I prove my thesis through the lens of United States federal government action, which paints an illuminating picture for this discourse because of the United States' model system of separation of powers and checks and balances. The late U.S. Supreme Court Justice Antonin Scalia proclaimed before the U.S. Senate Judiciary Committee in 2011:

“If you think that a Bill of Rights is what sets us apart, then you are crazy. Every banana republic in the world has a Bill of Rights. Every president for life has a Bill of Rights. The Bill of Rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. I mean that literally... We guarantee freedom of speech and of the press. Big deal! They guaranteed freedom of speech, of the press, of street demonstrations, and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Wonderful stuff. Of course, [it was] just words on paper. – what our Framers would have called a parchment guarantee, and the reason is that the real Constitution of the Soviet Union... did not prevent the centralization of power” (Scalia).

Given Justice Scalia's prescient words, if even the United States Constitution's structural provisions have failed to constrain the coercive regulations borne out of an administrative bureaucracy, citizens must realize how grave a threat this additional branch of government poses in all nations with the types of agencies I address. Administrative agencies, and the issues they regulate, are ubiquitous throughout the globe. Utilizing the United States as a case study, I will analyze (1) congressional delegations of power; (2) back-end agency deference; and (3) coercive agency adjudication.

1. Delegations of Legislative Power

John Locke understood the trouble of legislative power delegations in the 17th century. In the same document that he conceptualized the role of government in defending natural rights like property, Locke declared, “The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands” (Locke).

When Congress debated healthcare reform in 2010, then-House Speaker Nancy Pelosi infamously remarked, “We have to pass the [Affordable Care Act] so that you can find out what is in it” (Pelosi). A similar sentiment exists regarding agency delegations, which the following examples clearly demonstrate.

a. 2021 COVID-19 Vaccine Mandate

In the fallout of the COVID-19 pandemic, the Occupational Health and Safety Administration, a regulatory agency within the Department of Labor, issued a vaccine mandate covering almost all employers with at least 100 employees. This action impacted 84 million workers, which does not even account for indirect effects on the larger American workforce and economy. But where did OSHA’s power originate? Congress, in the annals of the U.S. Code, authorized OSHA to issue

“emergency” regulations upon determining that “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful” and “that such emergency standard[s] [are] necessary to protect employees from such danger[s]” (29 U.S. Code § 655). Such broad language allows congressional fatigue to take hold. Given the difficulties of forming majority coalitions, the mindset is simple: *why must Congress act when bureaucrats can?*

b. 2022 Student Loan Relief Plan

Agencies are generally unwilling to let supposedly “emergency” powers go easily. In 2022, despite the minimized risk of COVID-19, Secretary of Education Miguel Cardono turned to the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to issue “waivers and modifications” to discharge \$10,000 of federally-held student loan debt for the tens of millions of Americans who, despite their advanced degrees, had an income below \$125,000 in 2020 or 2021. Individuals who had received Pell Grants would receive a \$20,000 discharge under this plan. It did not matter that Congress passed the HEROES Act after the September 11, 2001 terror attacks to assist borrowers impacted by the terror attacks, especially those in the military. The Secretary saw broad language and a policy favorable to some of the administration’s constituents and ran with it. Save that then-Speaker Nancy Pelosi had said the exact opposite while supporting the underlying policy in 2021:

“People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress” (Pelosi).

c. Clean Power Plan

A back-end provision of the 1970 Clean Air Act states that while states set rules governing energy sources, the federal Environmental Protection Agency (EPA) derives the limit they have to comply with by ascertaining the “best system of emission reduction...that has been adequately demonstrated” (*West Virginia*, 12). Using this statutory provision, the EPA set the first-ever limits on carbon pollution from U.S. power plants in 2015, known as the Clean Power Plan, which essentially functioned as a cap-and-trade scheme. This alteration of a broad swathe of the U.S. energy industry and, in turn, the economic functions that rely on such energy emerged despite Congress’ inaction on the issue. Congress refused passage of similar measures in the 2009 American Clean Energy and Security Act and 2011 Clean Energy Jobs and American Power Act. The EPA? It could not take a hint.

Sure, the United States Supreme Court enjoined all of these rules in *National Federation of Independent Businesses v. OSHA* (2022), *Biden v. Nebraska* (2023), and *West Virginia v. EPA* (2022), respectively. But that is not the point. Had Congress been forced to act in the first place instead of relying on agencies, proper solutions to these problems – while respecting Locke’s theories of property rights – could have been achieved. Agency action, even when eventually struck down, stymies change.

2. Agency Deference in Article III Courts

What happens when individuals challenge agency rules in federal, Article III, courts only exacerbates this issue. Several U.S. Supreme Court precedents have given agencies seemingly free-floating powers.

a. *Chevron* Deference

Chevron deference refers to the legal principle established by the 1984 case *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, which provides a framework for courts to defer to a federal agency's reasonable interpretation of ambiguous statutory language when applying and enforcing the law. The logic behind this makes sense: Agencies are supposed to be the experts on the issues they regulate, so who are courts to second-guess this expertise? In practice, however, this deference has not been about narrow expertise questions. For starters, what did the respective agencies argue in Court in all three cases outlined previously? *Chevron*. This system leads to an endless spiral: Everything is ambiguous if you ask an agency, and nearly everything is within some agency's purview because of legislative delegations.

b. *Auer* Deference

Further limiting judicial review of agency action, *Auer* deference, originating in the 1997 case *Auer v. Robbins*, establishes that courts should defer to an administrative agency's interpretation of its own regulations if the regulations are ambiguous and the agency's interpretation is reasonable. Not only are agencies given substantial leeway in interpreting acts of Congress, but they are also given substantial leeway when interpreting their own regulations based on these

laws. Under *Auer*, agencies can both *make* and *interpret* the law with minimal oversight from federal courts, promoting arbitrary outcomes while compromising the separation of powers in the administrative state.

c. City of Arlington

Nothing demonstrates how flawed this deference approach is better than the Supreme Court's decision in *City of Arlington v. Federal Communications Commission (FCC)* (2013). In that case, the FCC attempted to expand its regulatory authority to include zoning regulations imposed by municipal governments. Justifying this expanded jurisdiction under *Chevron*, the FCC argued that it could interpret the Telecommunications Act of 1996 to determine – expand – its regulatory power affecting wireless communication infrastructure. If you question whether you misread the previous sentence because it would seem so stunningly implausible that an agency would get judicial deference to determine whether it had the threshold power to regulate something, your instincts prove my point. The Court, unfortunately, was less persuaded.

3. Prosecutor, Jury, and Judge: Adjudicating Private Rights

Compounding the issue of Congress' delegations of legislative power to federal agencies is the coercive way agencies exert such power. When adjudicating private rights, those historically defined as life, liberty, and property, administrative agencies act as prosecutors, judges, and juries. As U.S. Supreme Court Justice Clarence Thomas opined, "Under such schemes, administrative agencies may impose orders and penalties on private parties; adjudicate them

before agency administrative law judges (ALJs); and only then be subjected to deferential review by an Article III court” (*Axon Enterprise*, 25). If you are found defending yourself against tens of thousands of dollars in monetary fines from the Securities and Exchange Commission or Federal Trade Commission, who would you appear before? An administrative law judge or, in other words, someone appointed by the head of the very executive agency taking adverse action against you. With judicial review sharply limited, this approach not only does severe damage to the separation of powers but also to due process and jury trial rights.

Conclusion

The preamble to the U.S. Constitution boldly proclaims, “We the people.” To reclaim these words, the United States Congress must diminish the self-serving administrative power grabs that have marked the 20th and 21st centuries by passing binding regulations themselves – laws – to minimize agency authority over all aspects of American life.

Instead of action by popularly elected members of the legislative branch, broad congressional delegations and significant agency deference have emboldened the administrative state’s coercive nature, which has become an almost fourth branch of government within the United States. Rule by experts might seem desirable, especially in times of emergency, as the recent COVID-19 pandemic brings to mind. I do not doubt the IQ of these individuals, but that is beside the point. The question is whether the IQ of a select credentialed few surpasses that of the collective United States citizenry that their actions impact. Any sense of democratic legitimacy dictates that the answer must be “no.”

Every nation with an administrative bureaucracy empowered by legislative inaction has a choice: rule that is unrestricted by law or an increase in actual laws – those passed by democratically accountable officials. Even for libertarians, choosing the latter option should be straightforward. At the very least, the elected officials taking such actions would be constrained by the voters, promoting compromise, moderation, and accountability.

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