

The Ambition of the Administrative State

By: Susan E. Dudley | August 30, 2019

Preparation for a roundtable [discussion](#) titled, “Is the Administrative State a Crisis of Constitutionalism?” at the [American Political Science Association](#) annual meetings this week has me thinking about the vision America’s Founding Fathers had for their new country. In drafting our Constitution, they were mindful of the dangers to individual liberty of concentrating too much power in any one group. They strove for the *separation of powers*, wherein federal power is limited, and divided among three branches of government: the legislature, the executive, and the judiciary. The Constitution also embodied *checks and balances* through which one branch can challenge the powers or decisions of another.

Over the last century, some legal scholars have become concerned that these checks and balances no longer constrain the size and reach of the “[administrative state](#),” which generally refers to the executive branch agencies that write and enforce regulation. By any measure, the scope and reach of regulation has grown dramatically. The *Code of Federal Regulations* has [ballooned](#) from fewer than 20,000 pages in 1938 to more than 185,000 in 2018, and regulatory agencies continue to issue [thousands](#) of new regulations each year.

Is this necessarily a bad development? Many scholars would argue that it’s not; executive branch agencies have specialized expertise that arguably equip them to decide on technical matters or to resolve controversial issues in a less political manner than elected officials. As the Supreme Court [opined in 1989](#), “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

Others warn that regulatory agencies aren’t sufficiently accountable to the American people. The regulations they issue are binding laws, imposed not by elected representatives in Congress as the Constitution envisioned, but by unelected officials in regulatory agencies. There is little question that has eroded the importance of the legislature, which the Constitution’s Framers intended to reflect the will of the people and be the most powerful branch.

Critics attribute the increasingly unwieldy regulatory enterprise to Congress itself for ceding its legislative authority, as well as to the judiciary for deferring too much to regulatory agencies, and to the

In brief...

America’s Founding Fathers strove for a government based on a *separation of powers*, wherein federal power would be limited, and divided among three branches. Counting on “ambition [to] counteract ambition,” they designed the Constitution to allow each branch to challenge the powers or decisions of another. Over the last century, the executive branch has grown dramatically, raising questions as to how relevant the Framers’ notion of *checks and balances* is today.

executive branch for amassing too much power for itself. Understanding why the agencies seek to accumulate power may not require much imagination; as career officials, they gain [influence](#) as their authority expands. But what motivates the other two branches to cede authority? Why doesn't "[ambition counteract ambition](#)" as the Framers intended?

In his new book, *[Judicial Fortitude: The Last Chance to Rein in the Administrative State](#)*, Peter Wallison attributes much of Congress's unwillingness to constrain the executive branch to the evolution toward political parties, a development he suggests the Framers had not anticipated. He argues that party loyalties have made Congress less independent of the president, and thus, especially when the same party controls both Congress and the presidency, less able to hold him accountable.

Members of Congress are rewarded for passing legislation with lofty but vague goals, and then delegating to administrative agencies all the difficult decisions regarding design and implementation. If constituents object when they face undesirable consequences from the implementation of those goals, legislators can [duck responsibility](#) by placing the blame on overzealous bureaucrats, rather than their vague statutory authorizations.

The Framers expected the judiciary would stop the other branches from stepping outside their assigned roles, but over the last century, the judiciary has increasingly deferred to the executive on interpretations of their authority. Some consider this proper "[judicial restraint](#)," arguing that it's appropriate for the judiciary to defer to the political branches on questions of policy. But others argue that, by granting executive branch agencies broad latitude in interpreting the extent of their own authority, the courts have allowed Congress to shirk its constitutional responsibilities. [Wallison](#) argues that if the courts were to start sending disputed questions back to Congress for resolution, legislators may be motivated to write less ambiguous statutes in the first place.

I'll be curious to see how my fellow political science panelists answer the question of whether the administrative state represents a constitutional crisis.