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# Judicial Antagonism to Executive Power: An Analysis of Emerging Doctrinal Trends in Federal Courts

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## Introduction

The United States constitutional system presumes a sense of discord between branches of government. Conflicts range from competing political ambitions to substantive disagreements about the function of law. Article III established a federal judiciary designed to "shield against both the despotism of the prince and the oppressions of the representative body".[85] Courts are arbitrators tasked with resolving critical power disputes that accompany day to day governance.

Questions regarding separation of powers are as old as the republic itself.[86] The Constitution's vesting clauses prescribe the inherent functions of the executive, legislature, and judiciary. When litigating their cause, branches have assumed a sense of exclusivity to their respective domains. Textually outlined boundaries are violated when one branch enters into the realm of another. This understanding has given rise to the non-delegation doctrine, a constitutional principle that forbids branches from conceding or delegating their power, namely with regard to legislative-executive functions.[87]

Non-delegation, albeit with its limitations, remained solidified up until the New-Deal Era. The subsequent growth of the executive branch was led in large part by the creation of new federal agencies, some as subsidiary agents of other departments, others as independently established entities. These agencies possess powers which transcend legislative, executive, and judicial lines. Given the adversarial reality of the "administrative state", Congress enacted the Administrative Procedures Act (APA) in 1946, a law that grants federal courts judicial review over the reasonableness of agency rules and regulations.[88] Those deemed to be ambiguous and without sufficient legal justification can be subject to invalidation via the "arbitrary and capricious standard".[89]

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[85] Kevin Arlyck, *The Executive Branch and the Origins of Judicial Independence*, 1 J. AM. CONST. HIST. 343, 345 (2023).

[86] *See* Wayman v. Southard, 23 U.S. 1 (1825).

[87] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.")

[88] 5 *U.S.C.* §§ 551–559, 701-706. ("The reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…").

[89] Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477 (2022).

Several legal controversies during the administrations of Donald Trump and Joe Biden have featured the non-delegation doctrine and the arbitrary & capricious standard as doctrinal measures of executive power. Lawsuits have contested the validity of executive and agency actions concerning significant matters of public policy including education, immigration, and the environment. The judiciary's role in these disputes cannot be understated. Lower court judges and Supreme Court justices have exercised judicial power to rescind multiple executive orders, directives, and agency rules. This tendency has resulted in a contemporary separation of powers struggle. Over the past several years, lower federal courts and the Roberts' Supreme Court have demonstrated strong doctrinal antagonism to the manifestation of executive power within various departments and agencies, utilizing non-delegation and arbitrary & capricious review to eliminate executive deference while asserting a posture of judicial independence.

**Executive Power as a Spectrum: *Biden v. Nebraska***

While executive power exists in many forms, it must have a derivative, either from the Constitution or a congressionally enacted law. Within a statute, this power can be explicit, implied, or altogether unauthorized. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* conceptualizes executive authority into three categories: explicit or implied powers granted by Congress, instances where Congress has been silent, and cases where the executive openly resists Congress.[90]

The complexities of the administrative state and the growing size of federal cabinet-level departments prevent Congress from speaking on every issue that may face the executive branch in the daily administration of laws. Agencies must look to their establishing statutes for guidance on what power they have been expressly granted. Courts have traditionally deferred to agency interpretations of power so long as they are reasonable, and concern matters over which the agency has jurisdiction. Such a deference tends to be invoked when statutory grants of power are ambiguous.[91]

Yet Courts are willing to disregard these established principles if they possess a strong aversion to centralized executive power. The Roberts' Supreme Court offers a case study of this attitude, especially when presented with controversies that feature novel or unprecedented policy questions.

Pursuant to the HEROES Act of 2020, the Biden Administration's Secretary of Education sought the cancelation of $430 Billion in student loan principal debt as the nation recovered from the COVID pandemic. The law contains a provision that allows the Secretary to "waive or modify" existing statutory financial assistance programs which include federal student loans.[92] MOHELA, a contracted student loan servicer tasked with the collection of these loans, filed suit in federal court, alleging the debt relief program to be an unconstitutional overstep of executive power that exceeded the authority authorized by the statute.

Following several appellate petitions, the Supreme Court sided with MOHELA,

[90] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

[91] *See* Chevron v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). This case establishes a form of executive deference known as *Chevron* Doctrine. Courts are to defer to a "reasonable" agency interpretation of a statute when the statute itself is ambiguous and or implicit legislative delegation. If an agency's action is based on a permissible reading of the statute, the action is valid so long as the administrative interpretation was issued by the agency to which the statute granted such authority.

[92] 20 U.S.C. § 1098bb(a)(1).

holding that the Secretary was not granted such power by Congress.[93] Justice Robert's majority opinion rests on the text of the statute itself; the Court argued that the relief program does not constitute a waiver or modification but rather "nullifies existing provisions [of law] … augments and expands them dramatically".[94] In dissent, Justice Kagan notes that the HEROES Act provision concerns unanticipated national emergencies; Congress had granted the executive an implied power should the need to alter student loan forgiveness programs arise.[95]

While the dissent acknowledges that Congress can prescribe implied powers to the executive, in keeping with *Youngstown*, the majority's view expressly rejects the Secretary's statutory power to cancel student loan debt and does not address whether such a power is textually implied. No analysis is conducted by the Court relating to the nature of the executive power in dispute, nor are the Secretary's actions considered in light of the statute's contextual purpose.[96]

*Biden v. Nebraska* conveys the blurriness of executive power even when judicial review is restricted to the language of a statute. If the Court was truly interested in a case-by-case examination of administrative actions it would pursue a uniform template of statutory analysis in every case concerning the boundaries of executive power, a truly non-discriminative method of evaluation. But this approach would elevate the likelihood of executive power expansions depending on the ambiguity of the statute in question.[97] Here, the judiciary loses its leverage. As multiple cases illustrate, the Court is keen to avoid any consistent method of review. And because the Court's attitudinal priority is to tame executive power, specific constitutional doctrines must be employed to provide a firmer substantive grounding for ideological motivations.

**Embrace of Strict Non-Delegation: *West Virginia v. EPA***

Legislative delegation forms the legal basis for rule-making administrative agencies. Sometimes this delegation is implicit, requiring an understanding of intent and context that goes beyond the mere words of a statute. This construction can fall on courts or agencies themselves. Following the advent of *Chevron* deference, interpretations of the non-delegation doctrine have placed this responsibility in the hands of agencies who, by their inherently political nature, are subject to greater accountability than the judiciary.[98] However, the Court's disdain for executive power has brought an end to *Chevron*; a new rigid application of non-delegation doctrine has since taken its place.

From the end of the Obama Presidency through the Trump and Biden Administrations, the Environmental Protection Agency (EPA) enacted a series of emissions caps pursuant to its Clean Power Plan (CPP), a program designed to reduce the amount of carbon waste in the atmosphere, most of which is emitted by industry polluters. Several states, including West Virginia, sued on the basis that their fossil-fuel economies would be harmed by

[93] Biden v. Nebraska, 143 S. Ct. 477 (2023).
[94] *Id.,* at 18.
[95] *Id.* at 1 (Kagen, J., dissenting).
[96] *See* Foster v. United States, 303 U.S. 118, 120 (1938) ("Courts should construe laws in harmony with legislative intent and seek to carry out legislative purpose"). The intent and purpose of legislation is outlined in congressional committee reports and the *Congressional Record*. Because the Opinion of the Court does not consult these sources, the Court fails to consider the intent and purpose of the HEROES Act.
[97] *Chevron* 467 U.S. at 865.
[98] Ilaria Di Gioia, *A Tale of Transformation: The Non-Delegation Doctrine and Judicial Deference*, 51 U. BALT. L. REV 155, 165 (2022).

such regulations. At issue in *West Virginia v. EPA* was whether Congress delegated the EPA power to establish emissions caps, a quasi-legislative function.[99]

The Supreme Court staunchly rejected this power and repudiated *Chevron*. In a decision designed to assert judicial independence from the executive, the majority held that separation of powers and a general understanding of congressional autonomy prevented any agency from self-interpreting ambiguous statutory text.[100] Agencies instead must point to clear authorization that goes beyond plausibility.[101] Congress should therefore speak explicitly before the executive branch can claim regulatory power over a specific area of policy. This newly promulgated standard is known as the "major questions doctrine". The delegation need not only be clear but cannot allow agencies to discern for themselves matters of significant policy interest. Through its ruling, the Court expressed its belief that executive power is valid only if it involves an explicit grant of statutory authority, contrasting the three potential "zones" of power outlined in *Youngstown*.[102] Further, Congress' inability to guide agencies through implied and broad delegations' rebukes even the most stringent view of non-delegation in *J.W. Hampton Jr. & Co*.[103]

These inconsistencies demonstrate executive antagonism to the highest degree, an open objection to the influence of administrative agencies in modern law and politics. If agencies must rely on unreasonably specific authorizations to perform their regulatory functions, their overall power is significantly reduced, a core objective for many federal judges and the Roberts Court itself. Non-delegation is a remedy to the ubiquitous fear of executive despotism, a fear "deeply engrained in the national psyche."[104]

**Arbitrary & Capricious and Judicial Supremacy: *Department of Homeland Security v. Regents of the University of California***

The APA's inclusion of the arbitrary and capricious standard is akin to rational basis review of economic regulation but concerns only the administrative realm. The test utilized by courts is simple to comprehend but difficult to apply: did an agency act unreasonably prior to codifying a rule or regulation?[105]

In practice, judicial review of agency rules is correlated with conceptions of executive power, particularly whether agencies are engaged in expertise-based rulemaking. In the 1960's and 1970's, courts began applying a strict version of the arbitrary and capricious standard, known as "hard look", to scrutinize the material motivations and elements of agency rules, aiming to ensure that all regulations were supported by applicable data.[106] This approach reveals an inherent distrust of the executive branch. Whether legitimate or not, the judiciary has shown its willingness to undo the growth in executive power that

[99] West Virginia v. Environmental Protection Agency 142 S. Ct. 2587, 2606 (2022)
[100] *Id*. at 2615.
[101] *Id*. at 2618.
[102] *Youngstown* 343 U.S. at 637.
[103] *J.W. Hampton Jr. & Co.* 276 U.S. at 404. ("It may be that it is difficult to fix with exactness this difference [raising of customs revenue] but the difference which is sought in the statute is perfectly clear and intelligible."). Implied delegations are not necessarily intended to be vague and up to agency interpretation; in many cases they reflect a comprehensive "intelligible principle" that Congress intends to confer.
[104] Luke A. Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J.L. & LIBERTY 751, 759 (2022).
[105] Mechanick, *supra* note 4.
[106] Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2 (2009).

encompasses the modern regulatory sphere. In both the Trump and Biden Administrations, courts have carried out this vision, resulting in the invalidation of executive actions many of which relate to federal immigration policy.

The Deferred Action for Childhood Arrivals (DACA) program was rescinded via a Department of Homeland Security (DHS) order in 2017.[107] Representatives from the University of California filed suit alleging the action to be an arbitrary and capricious decision that failed to consider the consequences for individuals already domiciled in the United States. On appeal, the question before the Court involved whether the proper APA procedures were followed in repealing the program.

In the majority opinion, Justice Roberts held DHSs full recission of DACA to be arbitrary and capricious; the agency's repeal of collateral "benefits" would harm program recipients seeking to have their deportation deferred.[108] Multiple agency memorandums did not consider the reliance interests of DACA participants nor were there discussions of less restrictive policy options.[109]

The critical element in this case is *how* the Court chose to apply the arbitrary and capricious test. In a departure from commonly applicable reasonability tests, the Court made a judgment on the scope of agency due diligence which it deemed to be insufficient.[110] Rather than evaluating the reasonableness of data the agency chose to consider, the Court conducted its own analysis about the implications of repealing DACA.[111] Roberts admits that "DHS was not required … to consider all policy alternatives in reaching [its] decision" but nonetheless found its order to be unlawful.[112]

Just as non-delegation was altered to achieve a reduction in executive power, so was the arbitrary and capricious standard. Regardless of the political merits of the DACA policy, the Court has crafted new interpretations of fundamental separation of powers doctrines. At play here are the mechanics of judicial supremacy; even matters traditionally reserved for agency discretion are not immune from scrutiny.[113]

**Arbitrary and Capricious in Lower Federal Courts: *Biden v. Texas***

The Roberts Court's decisions have affected the way federal district courts

[107] See Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, Department of Homeland Security, https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[108] Department of Homeland Security v. Regents of the University of California, 140 S. Ct. 1891, 1914 (2020).

[109] See Duke, *supra*, note 23.

[110] Mechanick, *supra*, note 4, at 481. Courts have evaluated the reasonability of executive decisions prior to and following the enactment of the APA, albeit with inconsistent outcomes. The Roberts Court's departure from this approach defies a "default rule of statutory interpretation".

[111] Department of Homeland Security, 140 S. Ct., at 1914. ("reasoned analysis must consider the 'alternatives that are within the ambit of existing [policy]'", citing *Motor Vehicle Manufacturing Assn. of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.,* 463 U.S., at 42.)

[112] *Id*., at 1917.

[113] Agencies have historically been granted autonomy when conducting policy due diligence. *See* Wagner, et. al., "Deliberative Rulemaking: An Empirical Study on the Participation of Three Agency Programs", 73 *Administrative Law Review* 609, 625, citing Wendy Wagner, EPA Case Studies for Deliberative Rulemaking 3, 7, 10, 15 (June 28, 2020) (unpublished manuscript), ("explaining that EPA relied on the expertise of top level companies like DuPont for scientific information, but independent officials and government contractors independently made policy evaluations and occasionally rejected the advice of industry experts.") (available at https://utexas.box.com/s/vhn6an099he7qkubo70qx82f51jwrflf).

approach challenges to executive authority. In many cases, these tribunals have mirrored such antagonism, also relying on the arbitrary and capricious standard to strike down executive orders. Since district courts are the courts of first instance, they almost never provide finality to policy disputes. Their mechanism for restricting executive power is the universal injunction; equitable relief that applies to all entities "concerned" with the case, whether parties or not. These injunctions are applicable nationwide, even outside of a district court's jurisdictional boundaries.[114] Enforcement of executive actions can be enjoined, irrespective of their legal merit, while litigation plays out at the appellate level.

Lower court judges have issued universal injunctions against immigration policies that reverse previous DHS rules. In 2022, the U.S. District Court for the Northern District of Texas granted an injunctive stay against agency action that aimed to suspend portions of the Remain in Mexico asylum policy.[115] This case concerned mandatory-detention obligations that would allow migrants to usurp detention protocols pursuant to the Immigration and Nationality Act to ease the burden on detention resources. The court held that any action by DHS is arbitrary and capricious if it fails to uphold immigration laws intended for the adequate operation of the immigration system; mere consideration of potential effects to the system is not a sufficient analysis that can be upheld.[116]

As in *Department of Homeland Security*, the district court found fault with DHS's autonomy in carrying out immigration laws even though such laws are subject to enforcement adjustments by agencies as a result of changing conditions. The Court's entrance into the realm of enforcement burdens executive authority. Despite informed determinations of fact, agencies can be prevented from implementing rule changes that they, not the judicial branch, are tasked with establishing.

Here, the definition of arbitrary and capricious changes once again. Instead of reasonableness or the extent of fact-finding, an action is unlawful if it proports to violate a "fixed" immigration statute. Despite the merits of this question having yet to be decided, the impact on executive power remains solidified; enforcement of the agency rule is barred until a higher court removes the stay order, a process which is likely to take months given the delays associated with interlocutory appeals.

**Implications for Executive-Judicial Relations**

These cases illustrate a firmly situated judicial posture. As disputes regarding executive power arise in federal courts, a trend is becoming increasingly obvious to litigants. Advocates for the executive branch, including departments or agencies themselves, must be cognizant of how both non-delegation doctrine and the arbitrary and capricious standard have been construed to their disadvantage. Yet even proactivity of this nature does not guarantee doctrinal consistency.[117]

The varying judicial interpretations of these principles make it difficult to formulate concrete legal arguments. Plaintiffs, whether advocacy groups, states, or other branches of the federal government, enjoy significant advantages when seeking

[114] See Mila Sohoni, *The Lost History of the 'Universal' Injunction*, 133 HARV. L. REV. 920 (2020).
[115] Texas v. Biden, 646 F. Supp. 3d 753 (N.D.TX. 2022).
[116] *Id*., at 21.

[117] See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 778 (2014). (The proposal herein suggests courts should deconstruct arbitrary and capricious review "to promote consistency in particular courts" and "to give guidance to lower courts about how judicial deference [to agencies] should be apportioned".)

to invalidate executive actions. The requirement of strict congressional authorization under the major questions doctrine poses a challenge to agencies seeking to defend their rule-making abilities. Moreover, given the lack of specificity on what constitutes an arbitrary and capricious action, petitioners have a greater likelihood of success targeting a procedural technicality, rather than the actual legality or feasibility of a particular executive policy. The extinction of the "reasonability" analysis only increases the frequency of such approaches. Courts that lack a uniform scope of review place agencies at an inherent disadvantage when defending the exercise of their authority.[118]

*What* constitutes an exclusive matter for the executive branch has been thrown into doubt by recent court decisions. Constitutional scholars disagree as to the permissible extent of judicial review of executive actions. Some argue that review should be confined to the ministerial responsibilities of various officers (e.g., writ of mandamus), while others subscribe to an expansive view of judicial review, enabled both by constitutional checks and balances and statutes such as the APA.[119]

Such questions are likely to continue in academic and governmental settings. Resolution would require federal courts to achieve consistency in separation of powers cases, a prospect that seems grim in light of the aforementioned examples.

**Implications for Judicial Procedure and Remedy**

Judicial hostility to the executive undoubtedly invites controversy on the part of those affected by policy. An increased frequency in litigation is likely to yield a weakened executive, evidenced by the trends in recent cases. In terms of remedy, federal districts courts have been intent on issuing universal injunctions, most of which are preliminary and occur prior to full briefing on the merits. As previously mentioned, universal injunctions burden executive power in the short term but pose additional dangerous consequences for separation of powers in general.[120]

First, there is no constitutional nor historical basis for injunctions which concern individuals and institutions outside of the parties in a dispute. Article III limits federal jurisdiction to cases and controversies between the parties involved; courts have held that abstract rulings, applicable to outside parties and the general public are in contrast with the purpose of injunctive relief.[121] By ceasing national enforcement of an executive policy, a single judge is capable of paralyzing an entire department or agency.

Additionally, universal injunctions damage whole-of-government efforts and allow district courts to expand the effects of their rulings without a wide pool of plaintiffs.[122] A single advocacy group that successfully persuades a court to enjoin an executive order or program has made policy for the entire nation, despite no other

[118] *Id*., at 738, citing Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI. L. REV. 555, 574-75 (2011) ("I would argue in favor of the utility of doctrines that define the breadth of review.
Clarity about what bases the agency needs to have touched should facilitate the courts' decisional process . . .").

[119] David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013 (2018).

[120] Hayden D. Presley, *A Universal Problem: The Universal Injunction*, 81 LA. L. REV. 627, 652-653 (2021).

[121] Howard M. Wasserman, *Nationwide Injunctions Are Really Universal Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 339 (2018).

[122] *Id*., at 377.

government stakeholders (executive or legislative) being involved in the litigation.

Lastly, the prevalence of "facially unconstitutional" executive actions are often cited in support of universal injunctions. But "a declaration of facial unconstitutionality does not expand the court's remedial authority".[123] The limitations imposed by Article III cannot be overcome by an opinionative ambition to curb executive power.

These overarching attempts to restrain the executive hide the residual perils of universal injunctions. Judges assume a sense of irrefutability and fail to examine unsubstantiated bases for these preliminary but far-reaching decisions. District court injunctions cannot justifiably render every citizen of the United States an injured plaintiff.

**Implications for Subject-Matter Executive Governance**

Overt skepticism of a maturing executive branch places the judiciary in an uncomfortable position. Rulings which invalidate various orders, directives, or regulations have the potential to become anti-democratic. *Chevron* was premised on the reality that agencies, by virtue of their position, are able to engage in effective oversight of their own power.[124] They each possess internal checks and must answer to Congress regularly. When courts reject this framework and apply sweeping judicial review, no popular reinforcement is available. Judges are not elected officials. Their decisions can be divisive and cause institutional harm to all branches of government.

Executive policy is the product of a solutions-based approach to governance. Those with expertise in a particular subject-matter can easily be left in the dark by a court that is preoccupied with doctrinal objections to executive power. If judges possess ideological beliefs counter to a specific policy, the scientific, economic, or legal reasoning which guided its creation can be cast aside all too easily.

*West Virginia v. EPA* is a striking example of policy discrimination. The carbon emissions- cap program developed by EPA was rooted in thorough scientific investigation over a number of years, spanning multiple administrations. Future environmental regulation that embraces the "generation-shifting" technology of the CPP will face immediate legal hurdles. Because the Clean Air Act does not discuss generation-shifting as a viable regulatory mechanism, new emissions caps that mirror the CPP model are prohibited *de facto* until Congress supplies its endorsement.[125] These types of technical determinations that were typically left to agencies under *Chevron* are now in the hands of the judiciary. The ambiguity of Major Questions Doctrine stymies the evolvement of regulations, substantially diminishing the elasticity of complex regulations, most of which are scientifically based.

Since the early 2000's, federal courts have taken a close look at agency research procedures, a troubling product of the non-delegation and arbitrary and capricious standards. This judicial policing maneuver has been solidified in the wake of *West Virginia* and *Department of Homeland Security*. Agencies are no longer free to govern independently within the confines of their establishing statutes; policies grounded in evidence become jeopardized in light of

[123] *Id*., at 384.

[124] Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WAS. L. REV. 859, 861 (2009) ("self-regulation is defined here as an agency action to limit its own discretion when no source of authority (such as a statute) requires the agency to act").

[125] West Virginia, 142 S. Ct. at 2618.

the courts' hostility to subject-matter regulations.[126]

**Constitutional, Political, and Civic Considerations**

Judicial antagonism of the executive branch carries significant political ramifications. With public confidence of the courts at an all time low, judges and Justices risk alienating individuals from the political process, a troubling outlook for a democracy that is under constant threat externally and internally.

The Framers anticipated controversy involving the judicial branch. Unelected sources of power are dispositively positioned to counter republican principles and the pursuit of popular sovereignty. Courts are thus inherently vulnerable. Given that their decisions carry structural ramifications for American constitutionalism, they must carefully assess their position in the political order.

Chief Justice John Marshall, a jurist with nationalist political tendencies, was able to walk this line effectively despite questions about the logical reasoning of early Supreme Court decisions. Nonetheless, *Marbury v. Madison*, *Gibbons v. Odgen*, and *McCollough v. Maryland* have stood the test of time as constitutional legal principles but have also defined the judiciary as a political entity, one that balances the interests of adversarial citizens.

But by pursuing specific judicial objectives, the court acts as if it were a political branch subject to direct accountability when it is clearly not. Courts transcend legal and political spheres; their character is intrinsically elevated above partisan affinity, yet their substantive decisions must fall along some political line.[127] Judges themselves are not subject to elections and thorough oversight of judicial administration is minimal. If politics involves the authoritative delegations of resources and rights, the judiciary cannot be regarded as solely a political body, even though its pronouncements influence politics. For this reason, courts hold no justification for inhibiting the powers of coordinate branches of government. This role is the function of the Constitution alone. Judicial review, as a necessary tool for constitutional interpretation, is not a license to assume power which lies with the legislature or executive.

Unambiguous efforts to curb the power of the executive branch causes courts to lose their interpretive persuasion. On several occasions throughout the country's history, Presidential administrations have claimed that their exclusive power has been usurped by overactive courts. Andrew Jackson famously ignored the Supreme Court's decision in *Worchester v. Georgia*, finding fault with the constitutional rationale.[128] In *Ex Parte Merryman*, Abraham Lincoln asserted that his executive role was not properly recognized during wartime and

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[126] See Oliver Houck, *Arbitrary and Capricious: The Dark Canon of the United States Supreme Court in Environmental Law*, 33 GEO. ENV'T. L. REV. 51, 109 (2020). Houck levies an objection against the Court's decision in *Baltimore Gas and Electric Co. v. National Resources Defense Council* 462 U.S. 87 (1983) regarding the creation of a "super-deference" standard intended to apply to agency findings of scientific fact. Despite the lack of true science in EPA's decision to authorize a commission on nuclear power, the Court ruled that super-deference was not applicable on a different ground: Congress had not permitted the study of nuclear power given "substantial uncertainties". This shift in reasoning leaves the concept of science up to the Court; super-deference is merely a façade as the Court is truly interested in a "hard look" of all controversial agency pronouncements, specifically in the environmental realm.

[127] Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

[128] Matthew L. Sunquist, *Worchester v. Georgia: A Breakdown In the Separation of Powers*, 39 AM. INDIAN L. REV. 239 (2010-2011).

refused to honor writs of *habeas corpus*.[129] Regardless of the validity of such claims, the executive branch has lost its faith in the judiciary on previous occasions, jeopardizing the sanctity and immutability of the courts' interpretive word. Newfound tensions will only reignite the animosity responsible for these past constitutional indiscretions.

This type of judicial behavior also has lasting effects on the individual citizen. Governments, especially representative democracies, cannot endure when public confidence dies. If courts are seen as possessing prejudicial qualities, the fortune that has largely been enjoyed by the nation's legal system is subject to reversal. The role of a citizen is to observe and assess the state of their nation. Dissatisfaction is cause for a loss of respect. The judiciary, a branch of government that relies upon other entities to carry out its mandate, will alienate itself further from republicanism and constitutionalism the more it seeks to disturb executive governance. A resulting lack of civic confidence would place fundamental values of due process and rule of law at risk.

**Conclusion**

This inquiry has uncovered the judiciary's recent averseness for the growth of executive power. The cases here illustrate the absence of partisan influence in propagating these sentiments. No specific group of jurists or courts is directly responsible for this skepticism; instead, it is a wholly institutional tendency. Yet attempts to curb this trend through intervention may be just as hazardous as the trend itself. In his article entitled *Judicial Independence and the Reality of Political Power*, constitutional scholar Gerald Rosenburg views judicial relations with other branches of government as a natural evolution that shifts overtime, involving periods of overt subservience, neutrality, and strict independence.[130]

If judicial antagonism of the executive is indeed a natural phenomenon, it must not be countered by artificial means, even in spite of the harms it may inflict upon litigants, executive agencies, and constitutional separation of powers. While the equilibrium of the branches is undoubtedly disturbed by such a pronounced judicial attitude, doctrinal rationales are never perpetually engrained. The adaptation of non-delegation, arbitrary and capricious, and other forms of review should not be cause for long term alarm, despite the immediacy of their consequences. The essence of judicial philosophy is cyclical. Law is a spectrum that changes as time progresses. Courts are perpetually engaged in self-reflection to accommodate the law's ever-evolving trajectory. If the nation's legal and political development is truly indicative of the "American Experiment", contentions between the judiciary and the executive will resolve themselves in due course, even if it remains unclear as to how.

[129] Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer From the Arguments Surrounding Ex Parte Merryman*, 34 U. BALT. L. REV 11 (2004).

[130] Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).