Fringe Administrative Law

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Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 **U. Pa. L. Rev.** 841 (2014).

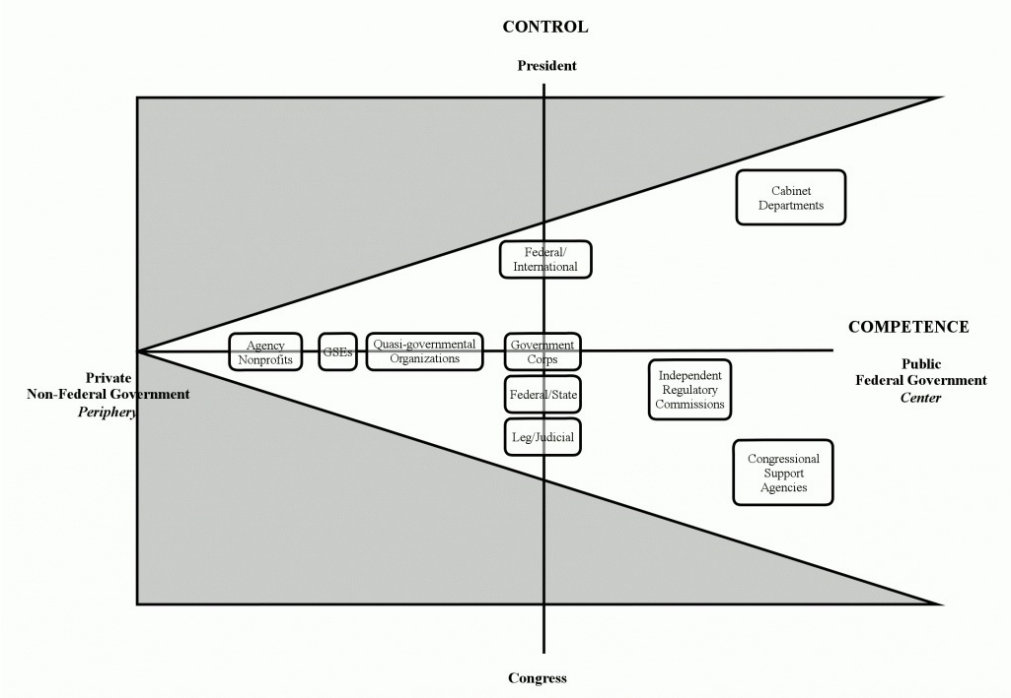
Last Term the Court gave administrative law scholars a lot to digest. Writing for the Court, the Chief Justice in *King v. Burwell* reinvigorated the major questions doctrine as a *Chevron* Step Zero inquiry, Justice Scalia in *Michigan v. EPA* ruled that the EPA must consider costs when a statute says to take action that is "appropriate and necessary," and Justice Sotomayor in *Perez v. Mortgage Bankers* abolished the D.C. Circuit's *Paralyzed Veterans* doctrine. The separate writings were perhaps even more intriguing. In *Mortgage Bankers*, Justices Alito, Scalia, and Thomas all indicated some appetite to revisit *Auer* deference. In *Mortgage Bankers* and the Amtrak case, Justice Thomas questioned the modern administrative state on separation of powers and nondelegation grounds, and then wrapped up the Term in *Michigan v. EPA* arguing that *Chevron* deference itself raises serious separation of powers concerns (and Justice Scalia may have suggested something similar in *Mortgage Bankers*).

These decisions all deal with foundational principles in administrative law. One decision, however, also grapples with the fringe: *Department of Transportation v. Association of Railroads*. At issue there was a congressionally created corporation—Amtrak—and its congressionally delegated authority to engage in joint rulemaking with a more traditional federal agency, the Federal Railroad Administration. The D.C. Circuit had held that Congress could not delegate regulatory power to Amtrak because it was a private corporation (at least for rulemaking purposes). The Supreme Court reversed, holding that Amtrak is a government entity for constitutional rulemaking delegation purposes.

The Amtrak case reminds us that our classic conception of administrative law often ignores the fringes. As Anne O'Connell details in *Bureaucracy at the Boundary*, which was published last year in the *University of Pennsylvania Law Review*, the fringes of administrative law are oft neglected in the literature and in the classroom. These government entities vary in form and function, ranging from Amtrak and the U.S. Postal Service (USPS), to Freddie Mac and Fannie Mae, to the Government Accountability Office and the U.S. Sentencing Commission. They differ substantially from classic executive agencies or even the somewhat more modern "independent" regulatory commissions and boards over which the Executive exercises far less control. Yet, as Professor O'Connell exhaustively documents, they play an important and substantial role in the modern regulatory state.

There is so much to like about this article. For example, Professor O'Connell notes that these boundary agencies are not necessarily a modern invention, as the USPS is the second oldest agency of the federal government—though it wasn't transformed from an executive agency to an "independent establishment" until 1970. Similarly, some agencies are created at the center and drift to the boundaries, and vice versa; agency structure can be quite dynamic over time. (Indeed, if Mehrsa Baradaran had her way, the USPS would adopt its Inspector General's proposal to provide financial services to the unbanked or underbanked populations in the United States.) In this short review, I'll focus on two of the article's main contributions to our understanding of fringe administrative law.

First, Professor O'Connell takes a fresh look at how agencies are created, in light of the "boundary agency" phenomenon yet with the traditional focus on political control and agency competence. Her two-dimensional model (Figure 1 below, click for a larger copy), reproduced with permission below, does a lot of work to help us take into account the fringes of administrative law:



Professor O'Connell then maps onto this control-competence model the normative values of social welfare and democratic legitimacy to illustrate the trade-offs at play when governing via boundary agencies. To be sure, her contribution to the theory of boundary agencies lies predominantly in the positive arena—the focus on control and competence—but her brief foray into the normative theories should spark further discussion and research.

Second, the article provides a terrific survey of the legal implications of boundary agencies, ranging from the constitutional concerns of separation of powers, nondelegation, and appointment and removal to the statutory concerns under the Administrative Procedure Act and Freedom of Information Act, and finally to the "governance mechanisms" such as Presidential oversight, the budget process, and agency litigation authority. Part of her conclusion, which the Court also reinforced in the Amtrak case this Term, is that the boundary agencies can be considered federal agencies for certain constitutional or statutory provisions and not federal agencies for others.

Another conclusion she reaches, which the current Court has arguably not reached, is that the existence of boundary agencies supports a more functionalist approach to structural constitutional interpretation. In Professor O'Connell's words (at page 900), "The prevalence of boundary organizations therefore suggests that formalist jurisprudence, if adopted more extensively, could radically transform the administrative state." Indeed, we may see these issues emerge in the Amtrak case itself, as the Court remanded the case to the D.C. Circuit noting that "substantial questions respecting the lawfulness of [Amtrak's regulatory efforts]—including questions implicating the Constitution's structural separation of powers and the Appointments Clause, U. S. Const., Art. II, §2, cl. 2—may still remain in the case." (Slip op. at 2.)

This article is part of Professor O'Connell's larger, ambitious project to encourage administrative law scholars (and students) to look at how administrative law actually operates in practice. For instance, as I blogged about here over at the *Yale Journal on Regulation*, Professor O'Connell has another terrific article, entitled *The Lost World of Administrative Law*, which she coauthored with Dan Farber and which the *Texas Law Review* published last year. In that article, Farber and O'Connell argue that we must look beyond the APA and the classic Supreme Court decisions; we must study presidential review of proposed agency action, multi-agency coordination, and agency action that is effectively insulated from judicial review—to name just a few examples.

In her response to their article, Lisa Heinzerling noted that "Farber and O'Connell have opened up a valuable conversation about how much of classical administrative law we should keep—and how much we have already lost." The same praise applies to O'Connell's *Bureaucracy at the Boundaries*: this is a must-read piece for all administrative law scholars to better understand the boundaries of the modern regulatory state. Indeed, I'm not alone in giving such high praise as just last week the American Bar Association recognized *Bureaucracy at the Boundary* as the best work of administrative law scholarship published in 2014. Now if only we could better incorporate this fringe administrative law in administrative law scholarship and curricula.

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