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The "Chief Executive" and the Quiet Constitutional Revolution

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THE "CHIEF EXECUTIVE" AND THE QUIET CONSTITUTIONAL REVOLUTION

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I want to focus on one particular issue that I do not necessarily claim is the most pressing challenge facing the administrative state in the next century, but it is certainly one that has the potential to reshape administrative law, both broadly and deeply. That issue is the emergence, in the last decade or so, of some important administrative law jurisprudence which envisions the President as the most constitutionally significant actor in the regulatory state. To put my thesis more provocatively, I am going to talk about the development and the dangers of the "cult of the Chief Executive."

We all know that the growth of the regulatory state has always been several steps ahead of the theory for explaining its constitutionality. A generation of scholars has worked on this problem, and a succession of different models has been proposed for reconciling agencies with the Constitution. But regulatory reality has always outpaced legitimating theory.

Now, this might be taken as evidence that the legitimacy question is an "academic" one—in the pejorative sense of that term. Those who can, regulate; those who cannot, write law review articles about regulation. But I believe this would be the wrong conclusion to draw.

Consider, for example, the profound impact on the actual practice of regulation attributable to what is probably the most famous legitimating theory, the "interest representation" model. It conceives of the ideal administrative process as a perfected legislative process, in which all affected interests will be heard by the agency and reasonably accommodated.

Pursuing this model, courts in the 1960s and 1970s transformed agencies' decisionmaking processes by opening them to broader public

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participation. The paper hearing requirements for rulemaking[1] and expanded notions of intervention rights in agency adjudication[2] are the legal progeny of that legitimating theory. So too are the expanded justiciability rules (reviewability, ripeness, standing) which meant—at least in their heyday—that anyone who believed she had not been fairly heard or accommodated by the agency could obtain judicial review.

My point now is neither to praise nor to condemn the effects on administrative law and practice that are traceable to the interest representation theory, but rather to emphasize that there *were* such effects, and they were substantial. Although the regulatory state may grind along on a day-to-day basis with a seemingly sublime indifference to its constitutional pedigree, it's hard to make administrative law—that is, to resolve conflicts about whether agencies are acting lawfully—without some underlying theory of what agencies are legitimately about in our constitutional democracy.

By the end of the 1970s, the interest representation model no longer worked as that underlying theory of legitimation. It had succumbed to a variety of criticisms,[3] the substance and validity of which are not really relevant here. What does matter is that, as we entered the 1980s, there was a void and into that void stepped the President: literally in the person of Ronald Reagan; figuratively in the constitutional persona of the Chief Executive.

The Chief Executive, as that term is now being used, implies not simply some ultimate managerial responsibility for how well the government runs. Rather, it asserts for the President an independent role in shaping domestic public policy.

This Chief Executive is a raw newcomer to the constitutional law landscape. We do not have the time for a 200-year tour of Supreme Court precedent, but I would just remind you of what is probably the most famous portrait of the nature of presidential power: Justice Jackson's opinion in the *Youngstown*[4] case. The President, Jackson said, may be said

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1. *See, e.g.*, Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

2. *See, e.g.*, National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

3. *See, e.g.*, Merrick B. Garland, *Deregulation & Judicial Review*, 98 HARV. L. REV. 505 (1985); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

4. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

to "personify the federal sovereignty" only when he acts with Congress's blessing; so long as Congress is silent, he may maneuver in an ambiguous "zone of twilight," where both he and Congress might arguably claim authority; but as soon as Congress does speak, he must retreat to a sphere of residual power in which he can prevail only if the Constitution disables Congress from acting.[5] This is not the picture of an Article II regulatory policy czar.

What happened to redraw this constitutional picture in the 1980s? Well, as you know, we saw during that period a renaissance of structural constitutional theory, particularly separation of powers. A powerful formalist movement emerged, which tended to be conservative in ideological orientation and anti-Congress in its doctrinal arguments. This is hardly surprising. The Republicans held the presidency, the Democrats held Congress, or at least the House. Conventional wisdom saw this as the pattern for the foreseeable future. Hence, a conservative agenda would sensibly push the legal regime toward the apparent political reality of occupying the White House, rather than Congress. Moreover, conservatives' general theoretical commitment to originalism dovetails nicely with an anti-Congress agenda. *The Federalist Papers*[6] speak eloquently of the dangers of congressional aggrandizement, and this fear of the Framers becomes a recurring theme in the new separation-of-powers jurisprudence.

At first blush, this seems a most unpromising environment for spawning a new legitimating theory. Renewed emphasis on separation of powers—particularly with a strong focus on the original understanding—would seem deeply hostile, if not actually fatal, to the regulatory enterprise. However, as it develops, the new formalism does not emphasize the nondelegation doctrine and the dismantling of the regulatory state. Instead, its crucial move is to redefine the constitutional categories, with particular emphasis on the Article II power. "Executing" the law, it argues, means doing *whatever* remains to be done after the formal Article I lawmaking process is concluded.

Now in a world of broadly delegative regulatory legislation, finding some constitutional home for all the government activity that occurs after the statute has been passed is no small accomplishment. A single clause tucked within Article II—"and he shall take care that the laws be faithfully executed"[7]—now inspires a whole new legitimating model. Through the President's exercise of his constitutional responsibility, agencies take their

5. *Id.* at 635-38.
6. THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).
7. U.S. CONST. art. II, § 3.

place within the constitutional design. Through him, "We, the People" control the bureaucracy. Thus, the theory of the Chief Executive serves simultaneously as an opportunity to legitimate the administrative state and as a demand for enhanced presidential control over regulatory decisionmaking.

Now this conception of the executive power is central to the rationale of *Chadha*[8] and *Bowsher*,[9] and it serves as the basis for continued constitutional attacks on independent agencies.[10] However, the real impact of the emerging cult of the Chief Executive comes not in these major separation-of-powers bombshells, but rather in the way it is shaping "ordinary" administrative law. I point you to two of the most significant and controversial administrative law decisions in recent years: *Chevron*[11] and *Lujan*.[12]

After twelve years of seeing *Chevron* in action, we know well that the "*Chevron* two-step"—first, determine whether Congress has unambiguously spoken to the precise question at issue; then if not, defer to any reasonable agency interpretation[13]—has not "solved" the problem of how judges should interpret regulatory statutes. The Supreme Court's own post-*Chevron* cases show enormous variability, particularly in step one, and the "two-step" cannot plausibly accommodate the judicial aggressiveness of a textualism like Justice Scalia's opinion in *MCI v. AT&T*.[14] Nevertheless, *Chevron* has become one of the defining moments of contemporary administrative law. It increased the rate at which courts of appeals affirm agency action.[15] Although it is still relatively young, it has already been cited[16] 33% more often than *Overton Park*,[17] and almost 400% more

8. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

9. Bowsher v. Synar, 478 U.S. 714, 732-34 (1986).

10. *See, e.g.*, Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (dismissing constitutional challenge to FTC authority to initiate prosecutions).

11. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

12. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

13. *Chevron*, 467 U.S. at 842-44.

14. 114 S. Ct. 2223, 2226 (1994).

15. *See* Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (examining effects of *Chevron* on patterns of appellate court remands to agencies).

16. *See* PETER STRAUSS, TODD RAKOFF, ROY SCHOTLAND & CYNTHIA FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 621 (9th ed. 1995).

17. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

often than *Vermont Yankee*.[18] What is its secret? Not, I would suggest, its interpretive directions *per se*, but rather its normative vision.

Unlike other kinds of arguments about the "right" way to do statutory interpretation—arguments based on relative competence, efficiency, etc.—*Chevron* speaks the language of legitimation. In noting the competing interests implicated in the decision to use the bubble concept,[19] Justice Stevens muses that perhaps Congress "consciously desired" the EPA to strike the balance, perhaps "it simply did not consider the question," or perhaps it was "unable to forge a coalition" on the issue. But, he concludes,

> For judicial purposes, it matters not which of these things occurred. Judges are not experts in the field and are not part of either political branch of government. . . . In contrast . . . [w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .[20]

Deference is right not because it yields *better* answers, more *efficient* answers, or even the answers Congress *would have wanted*, but because it yields more *legitimate* answers. The *Chevron* mystique flows from this promise that the ordinary act of statutory interpretation can advance the larger process of reconciling agencies with constitutional democracy.

In *Lujan v. Defenders of Wildlife*,[21] the role played by the theory of the Chief Executive is even more dramatic. The case arose when an environmental group sought judicial review of the agency's interpretation that federally supported activities in foreign countries are not subject to the "consultation requirement" of the Endangered Species Act.[22] The group failed to convince a majority of the Supreme Court that it had standing under the traditional tests.[23] More significantly, however, its attempt to use the "citizen suit" provisions of the act prompted the holding that Congress cannot authorize "any person" to sue to prevent the agency from violating the act.[24] The result *per se* was not shocking. No one could read the standing literature of the last twenty-five years without realizing

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18. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

19. The bubble concept considers the regulatory unit ("source") to be the entire plant rather than each individual pollution-emitting pipe. *Chevron*, 467 U.S. at 837.

20. *Id.* at 865.

21. 504 U.S. 555 (1992).

22. Endangered Species Act of 1973, 16 U.S.C. §§ 1531, 1536 (1994).

23. *Lujan*, 504 U.S. at 557-67, 571-78.

24. *Id.* at 571-78.

that citizen suit provisions pose tough constitutional questions.[25] What *is* remarkable is the Court's reasoning.

The conventional debate always saw the problem as a tension between the Article III requirement of injury in fact and Congress's Article I power to create new rights: Is legally cognizable injury really anything that Congress, acting within its substantive constitutional powers, says it is? However, like Alexander dealing with the Gordian knot, Justice Scalia demolishes an old problem with a brash new solution:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[26]

In other words, broadly authorizing review is neither necessary nor proper to keep agencies true to their statutory mandate. The Chief Executive is the constitutionally appointed keeper of the government's regulatory conscience.

Although *Lujan* is the most explicit in its reasoning, it is only one of a series of Supreme Court cases that increasingly concentrate, in the President's hands, responsibility for agency compliance with regulatory responsibilities. Consider the several recent cases that have narrowed pre-enforcement review.[27] Like *Lujan*, these cases do not merely decrease the availability of judicial review, they selectively disadvantage adjudication of certain *kinds* of claims that the agency has acted unlawfully. The regulated community might not like a ripeness doctrine that presents the unpleasant choice of either living with the rule or violating it and gambling on successfully defending an enforcement action. But closing down pre-enforcement review is potentially devastating to those who complain that the agency is doing too little or nothing at all. By hypothesis, there will not be an enforcement action to challenge the failure to regulate—and remember that since *Heckler v. Chaney*[28] (decided the term after *Chevron*),

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25. *E.g.*, William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37; David P. Currie, *Judicial Review Under Pollution Laws*, 62 IOWA L. REV. 1221, 1271-80 (1977); Louis L. Jaffe, *The Citizen as a Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

26. *Lujan*, 504 U.S. at 577.

27. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771 (1994); Reno v. Catholic Soc. Servs., Inc., 113 S. Ct. 2485 (1993). *Cf.* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

28. 470 U.S. 821 (1985).

the agency's decision not to institute an enforcement action is itself a presumptively unreviewable exercise of executive discretion.[29] Increasingly, the message coming from the Supreme Court to the class of regulatory beneficiaries has been, "Don't bring your problems to us. See the man whose job it is to worry about such things."

Well, what is wrong with molding administrative law around a growing reliance on the Chief Executive to assure the legitimacy and legality of regulation? After all, the 1960s and 1970s legacy of judicialization and judicial review has not been a resounding success.

It seems to me that it is unrealistic to think that the President can supervise the entire regulatory enterprise in any comprehensive and meaningful way. Of course, there will be cases like *Chevron* itself, where it is pretty clear that the agency was marching to the President's drum: Within months of Ronald Reagan's election to office, the EPA had done a 180-degree turn to embrace the bubble concept. But to routinely assume that regulatory behavior responds to presidential direction, and is shaped by his informed and deliberate calculus of policy preferences, is absurd. If the Court is abandoning the field—whether by adjusting the standard of review, as in *Chevron*, or the availability of review, as in *Lujan* and the other justiciability cases—let us at least be honest that what is replacing judicial oversight is political oversight of the most sporadic and fortuitous sort.

More fundamentally, I think we need to examine far more carefully the proposition that the will of the Chief Executive can supply the legitimacy that has eluded the administrative state. If we are going to return to first principles, we ought to remember that the fear of *legislative* dominance voiced by the Framers of the Constitution during the 1780s was the successor to the fear of *executive* dominance voiced by the Framers of the Articles of Confederation and the state constitutions in the 1770s.

What our Constitution made of that history was the judgment that "We, the People" would govern ourselves through the confluence of three very different voices: the House, the Senate, and the President. When one of these voices becomes the preeminent arbiter of our national will, I am not sure we are going to like what we hear. Consider the Title X gag rule litigated in *Rust v. Sullivan*.[30] The federal grant program for family planning clinics was almost twenty years old when first interpreted by the Bush Administration to prevent clinics from giving women any information about abortion. The Supreme Court sustains the new rule, relying heavily

29. *Id.* at 837.
30. 500 U.S. 173 (1991).

on *Chevron* deference.[31] Immediately there is frenetic activity in Congress. Bills to return to the original interpretation quickly pass both Houses, but President Bush is immovable—and the House is a handful of votes short of override.[32] And this was where the issue remained until one week after Bill Clinton took office when, with the stroke of a presidential pen, the gag rule was suspended.[33]

It seems to me that many people on both sides of the abortion issue would agree that this is *not* a regulatory success story.

It is hard to make good administrative law without a theory of what agencies are legitimately about in our constitutional democracy. But it is easy for courts to make bad administrative law when legitimating theory becomes an excuse to avoid facing the complex and unruly reality of the regulatory enterprise, and taking responsibility for choosing, among a set of concededly imperfect solutions, the approach that best captures both practical wisdom and our constitutional aspirations.

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31. *Id.* at 186.

32. *See* William J. Eaton, *House Sustains Bush's Abortion Counseling Ban*, L.A. TIMES, Nov. 20, 1991, at A1.

33. *See* Standards of Compliance for Abortion—Related Services in Family Planning Service Projects, 58 Fed. Reg. 7462 (1993) (codified at 42 C.F.R. § 59 (1995)).