Justice Scalia's Unparalleled Contributions to Administrative Law

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Justice Antonin Scalia contributed more to the development of administrative law than any other Justice in history. His contributions began long before his three decades of service on the Supreme Court. He was Chairman of the Administrative Conference of the United States—the government think tank that conducts studies of the administrative process and recommends best practices to agencies, Congress, and reviewing courts. He taught administrative law at University of Chicago and University of Virginia, where he made path-breaking contributions to administrative law scholarship. Before he was elevated to the Supreme Court, he served as a member of the Court of Appeals for the District of Columbia Circuit—the court that decides far more administrative law cases than any other.

Justice Scalia wrote scores of opinions on myriad issues of administrative law during his tenure on the Supreme Court. His opinions were shaped by two dominant values: skepticism about the legitimacy of judicial activism in a constitutional democracy and a strong aversion to ambiguity. Toward the end of his years on the Court, however, his opinions began to reflect a growing concern about the power of the executive branch of government. That concern seemed to give him pause that his longstanding skepticism about the effects of judicial activism might have led him to become too deferential to agencies.

I. STANDING TO REVIEW AGENCY ACTIONS

Justice Scalia authored many opinions in which he relied on the Constitution as the basis for a decision that denied

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standing to a private citizen to obtain judicial review of an agency action or to obtain judicial enforcement of an agency-administered statute against someone who allegedly violated that statute.[1] Justice Scalia often invoked the Case or Controversy Clause of Article III as one of the bases for a decision that denied standing.[2] Like many of his colleagues, Justice Scalia believed that a "Case or Controversy" within the jurisdiction of the Court can arise only as a result of a discrete agency action that uniquely injures an individual. He believed that a broad agency action that arguably causes injuries that are "shared by the many" is not within the Court's power to resolve and redress.[3]

Justice Scalia based many of his constitutional standing decisions on a theory that he described initially in an article he published in 1983 in *Suffolk Law Review*.[4] In Justice Scalia's view, the prohibition on standing based on injuries "shared by the many" prohibits courts from enforcing the public laws that Congress has entrusted executive branch agencies to enforce. Any judicial enforcement of such laws at the behest of members of the public who were among the intended beneficiaries of the laws would encroach upon the powers that the Vesting Clause and the Take Care Clause of Article II confer exclusively on the President.[5] After explaining his theory in the article that he wrote just before he joined the Court,[6] Justice Scalia introduced it to his colleagues in his 1988 dissenting opinion in *Morrison v. Olson*.[7] Over time, he may have persuaded as many as six of his colleagues to embrace his theory.[8]

Justice Scalia believed that only the politically accountable branches of government have the power to enforce laws, such as the Clean Air Act and the Clean Water Act, that are

1. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

2. *See, e.g.*, *Steel Co.*, 523 U.S. at 94–106; *Defenders of Wildlife*, 504 U.S. at 559–63.

3. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 32–38 (Scalia, J., dissenting).

4. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

5. U.S. CONST. art. II, §§ 1, 3.

6. Scalia, *supra* note 4.

7. 487 U.S. 654, 705–716, 724–28 (1988) (Scalia, J., dissenting).

8. Four Justices explicitly embraced the theory in the plurality opinion in *Lujan v. Defenders of Wildlife*, but it is impossible to know whether the two concurring Justices accepted the theory. 504 U.S. at 579–81.

intended to benefit the general public. If members of the public believe that an agency should be more aggressive in implementing and enforcing a public law, they should take their complaint to the agency or to the politically accountable President for redress. In Justice Scalia's view, the Vesting Clause and the Take Care Clause confer the power to implement and enforce public laws uniquely on the President and his agents. Consistent with that view, Justice Scalia believed that an agency with the power to implement and enforce a public law must be headed by a presidential appointee who can be removed by the President at will.[9]

Justice Scalia believed that the only remedies for the failure of an agency to enforce a public law sufficiently lay in the politically accountable branches of government.[10] If members of the public believe that an agency should be more aggressive in implementing and enforcing a public law, they should take their complaint to the agency. If the agency refuses to act in accordance with their views, they should take their complaint to the President. If the President agrees with the complaining party, he can remove the agency head from office and replace him with someone who is prepared to engage in more aggressive enforcement actions. If the President declines to act in ways that satisfy the complaining members of the public, their sole recourse lies at the ballot box. They should not be allowed to circumvent the political process by seeking redress from politically unaccountable judges.

Similarly, Justice Scalia felt that if an agency is unable to enforce a public law as aggressively as some members of the public prefer because of inadequate congressional funding, they should take their complaint to Congress. If Congress agrees with them, it will increase the agency's appropriations. If not, the sole recourse of the complaining members of the public is at the ballot box. They should not be allowed to circumvent the political process by taking their complaint to the politically unaccountable judiciary.

II. JUSTICIABILITY AND THE POWER TO REMOVE AN AGENCY HEAD

Justice Scalia's opinions on justiciability and the removal power followed logically from the political and constitutional

9. *See, e.g.*, *Morrison*, 487 U.S. at 705–16, 724–28 (Scalia, J., dissenting).
10. Scalia, *supra* note 4.

theory of government that was the basis for his standing jurisprudence. Thus, for instance, he consistently expressed the view that the President must have the power to remove any agency head at will.[11] To Justice Scalia, that power is required by the Vesting Clause and the Take Care Clause. The President cannot be expected to be able to implement the "executive power" or to "take care that the laws be faithfully executed" unless he has the plenary power to remove an officer who, in the President's opinion, is not faithfully executing the laws.

Similarly, Justice Scalia authored opinions in which he concluded that courts can review only "discrete agency actions" and cannot consider broad attacks on the manner in which agencies are implementing statutorily authorized programs.[12] Any broad complaints about agency practices must be lodged exclusively with the politically accountable President or the politically accountable Congress. If those politically accountable institutions fail to act effectively in response to those complaints, the complaining members of the public have recourse to the ballot box to redress their grievances. They should not be able to avoid the political process by seeking relief from politically unaccountable judges.

III. JUDICIAL REVIEW OF AGENCY ACTIONS

Justice Scalia's views on the proper role of courts when they review agency actions fit well with his views on standing to obtain review, justiciability, and the removal power. Justice Scalia was the most consistent proponent of the approach to judicial review that the Court announced in its 1984 opinion in *Chevron v. NRDC*:

> When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue,

11. *See, e.g.*, *Morrison*, 487 U.S. at 705–16, 724–28 (Scalia, J., dissenting).

12. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890–92 (1990).

> the question is whether the agency's answer is based on a permissible construction of the statute.[13]

The Court based the *Chevron* test in part on constitutional and political grounds. The Court distinguished between issues of law that a court can resolve by interpreting a statute and issues of policy that should be resolved by the politically accountable executive branch rather than the politically unaccountable judicial branch when Congress has declined to resolve the issue by statute. In the Court's words:

> Judges . . . are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While 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—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[14]

The political and constitutional underpinnings of *Chevron* are identical to the theory of government that is the basis for Justice Scalia's decisions on standing, justiciability and the removal power. If members of the public dislike an agency's policy decision, their recourse is to the agency, the President and ultimately to the ballot box. Politically unaccountable judges should not be permitted to circumvent that political process by resolving the policy dispute themselves.

Justice Scalia was not a member of the Court when it decided *Chevron* but he embraced the *Chevron* doctrine immediately after he arrived. In a 1987 opinion, a majority of Justices appeared to adopt an interpretation of the *Chevron* doctrine that Justice Scalia considered to be a de facto

13. Chevron v. NRDC, 467 U.S. 837, 842–43 (1984).

14. *Id.* at 865–66 (citation omitted).

weakening of the doctrine.[15] He wrote a separate concurring opinion in which he criticized the majority's apparent weakening of *Chevron* and engaged in a vigorous defense of the original *Chevron* doctrine.[16] He provided a comprehensive explanation of the reasons for his support for the doctrine and of its basis in political and constitutional theory in a 1989 article he published in *Duke Law Journal*.[17] He continued to support and apply the doctrine during his entire tenure on the Court, often in opinions in which he defended it from attacks by other Justices.[18] His support for the doctrine reached its apogee in a 2013 opinion in which he held that courts must confer *Chevron* deference even on agency interpretations of ambiguous statutory provisions that are intended to limit an agency's jurisdiction.[19]

IV. JUSTICE SCALIA'S AVERSION TO AMBIGUITY

Justice Scalia's consistent support for the highly deferential *Chevron* doctrine seems at first to be a poor fit with empirical studies of Justice Scalia's patterns of decisions in administrative law cases. Justice Scalia voted to uphold agency actions less frequently than any other Justice.[20] How can a Justice who criticizes judicial activism and extols the virtues of judicial deference to agency policy decisions vote with such great frequency to reject agency interpretations of agency statutes?

15. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

16. *Id.* at 454 (Scalia, J., concurring).

17. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 513–17 (1989).

18. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 221–26 (2002) (Scalia, J., concurring); United States v. Mead Corp., 533 U.S. 218, 245–50 (2001) (Scalia, J., dissenting); Christensen v. Harris Cty., 529 U.S. 576, 588–97 (2000) (Scalia, J., dissenting). In *National Cable & Telecommunications Association v. Brand X Internet Services*, a majority of Justices held that a judicial decision that upholds an agency interpretation of an agency-administered statute does not qualify as stare decisis unless the court concludes that the agency interpretation was the only permissible interpretation of the statute. 545 U.S. 967, 982–83 (2005). Many scholars believed that the holding in *Brand X* followed logically from the reasoning in *Chevron*. *See, e.g.*, RICHARD PIERCE, I ADMINISTRATIVE LAW TREATISE 182–83 (5th ed. 2010). Justice Scalia dissented, however, based on his belief that the *Brand X* opinion was another attack on *Chevron*. 545 U.S. at 1005–20 (Scalia, J., dissenting).

19. City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

20. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1154 tbl.20 (2008).

Justice Scalia explained that apparent inconsistency between his beliefs and his actions by referring to the other core value that motivated him throughout his career. He had a powerful aversion to ambiguity and rarely saw ambiguity in the text of statutes. He made that point explicitly in his 1989 article in *Duke Law Journal*.[21] After explaining why the deferential *Chevron* doctrine was required by his theory of government, he predicted that he would rarely invoke it as the basis to uphold an agency interpretation of an ambiguous provision of a statute.[22] Since *Chevron* requires a reviewing court to defer to an agency interpretation only when the court concludes that the statutory provision is ambiguous, Justice Scalia predicted accurately that he would rarely defer to an agency interpretation of a statute under *Chevron* because he rarely sees ambiguities in statutory texts.

Many of the opinions in which Justice Scalia defended *Chevron* from attack by other Justices can be explained in part by his powerful aversion to ambiguity. When the Court announced the *Chevron* test in 1984, many people, including Justice Scalia, believed that it replaced the test that the Court had announced in its 1944 opinion in *Skidmore v. Swift & Co.*:

> The weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier, and later, pronouncements, and all those factors that give it power to persuade, if lacking power to control.[23]

The multi-factor *Skidmore* test has often been criticized as ambiguous and unpredictable in the results of its application.[24]

From 2000 to 2002, a majority of Justices joined opinions in which they announced for the first time that the *Skidmore* test survived the announcement of the *Chevron* test.[25] They then instructed courts to apply *Chevron* in some circumstances and to apply *Skidmore* in other circumstances.[26] Their description of the circumstances in which a court should apply *Skidmore* rather than *Chevron* was not a model of clarity. Not surprisingly, Justice Scalia disagreed.[27] He disliked the

21. Scalia, *supra* note 17.

22. *Id.* at 521.

23. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

24. *See, e.g.*, PIERCE, *supra* note 18, at 155–57, 166–71.

25. Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576 (2000).

26. *Id.*

27. Barnhart v. Walton, 535 U.S. 212, 221–26 (2002) (Scalia, J.,

Skidmore test because of its ambiguity, and he particularly disliked the new legal regime the majority had created in the period from 2000 to 2002 because of the added ambiguity about which test a court is required to apply in various circumstances.

V. RECENT CONCERN ABOUT AGENCY ABUSE OF POWER

Over the last three years of his tenure, Justice Scalia began to write opinions that suggested that he was increasingly concerned about potential abuse of agency power and that he had become uneasy about the unintended effects of the judicial deference doctrines that he helped to create. In one of his last opinions he urged the Court to overrule a deference doctrine that is similar to the *Chevron* doctrine except that it applies to agency interpretations of ambiguous rules rather than ambiguous statutes.[28] He also engaged in a harsh critique of all deference doctrines, including *Chevron*:

> The [Administrative Procedure Act (APA)] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. . . . The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. . . . Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning [the APA's] directive that the "reviewing court . . . interpret . . . statutory provisions," we have held that *agencies* may authoritatively resolve ambiguities in statutes.[29]

CONCLUSION

We will never know how Justice Scalia would have resolved the apparent tension between the deference doctrines he helped to create and defend for decades and his new-found concern about the dangers posed by agencies that have a tendency to overstep the relatively loose boundaries created by those deference doctrines. In any event, we owe him a debt of

concurring); United States v. Mead Corp., 533 U.S. 218, 245–50 (2001) (Scalia, J., dissenting); Christensen v. Harris Cty., 529 U.S. 576, 588–97 (2000) (Scalia, J., dissenting).

28. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) (Scalia, J., concurring).

29. *Id.* at 1211–13 (2015) (Scalia, J., concurring) (citing *Chevron*, 467 U.S. at 842–43) (emphasis in original) (citations omitted).

gratitude for devoting his life to an attempt to create and to implement a coherent theory of administrative law to fit a constitutional democracy.