U.S. LAW REVIEWS: A FOCUS ON ADMINISTRATIVE LAW

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L.B. Solum, C.R. Sunstein, *Chevron as Construction*, 105 *Cornell L. Rev.* 1465 (2020)

In this article, professors Solum and Sunstein draw a clear distinction between the Chevron doctrine used for interpretation and for construction. Such a distinction is grounded in the Supreme Court's language in *Chevron* itself [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], and thus in its so-called two steps. The first step is to verify "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; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." [*Chevron*, 467 U.S., at 842–43]. If the intent of Congress is not clear, step two occurs. In that case, "the question for the court is whether the agency's answer is based on a permissible construction of the statute" [*Chevron*, 467 U.S., at 843]. The article assumes that it is possible to identify "two quite distinct Chevron doctrines" (1467). By reading *Chevron* as construction, agencies should be recognized some deference, because of their technical expertise, and such deference does not undermine the separation of powers principle (1471).

Since *Chevron* mentions the "ambiguity" of statutory language, the doctrine is usually meant "as applicable to both interpretation and construction – to both the discovery of meaning and the creation of implementation rules or the effort to specify a vague or open-textured language" (1473-1474). *Chevron* as interpretation implies the recognition of deference to an agency "in a case in which the question concerns the meaning of statutory language." It goes beyond *Chevron* as construction, and thus to "deference to the agency's decision about how to implement a statute within the construction zone created by vague or open-textured language" (1475). The authors refer to Justice Brett

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Kavanaugh's criticism of *Chevron* [See B.M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118 (2016)], especially of its application to cases, in which Congress has employed specific terms to define a rule. The point is explained as follows: "it is one thing to say that agencies should be allowed to adopt constructions that specify or implement the meaning of terms like 'source' and 'harm,' assuming these have not been defined in a way that resolves the question of construction. It is another thing to say that agencies should be allowed to decide what words are modified by the phrase 'to such extent as he finds necessary'" (1477). The authors acknowledge that the distinction they champion may be hard to detect in practice, or even in theory (1479-1482), and, nonetheless, they maintain it should be taken into account in case of a re-examination of the Chevron doctrine by the Supreme Court (1483). In their view, the doctrine may not be extended to interpretation of the law, thus to "resolving questions about the meaning of a statutory text", which is the courts' province (1487).

K.E. Hickman, A.L. Nielson, *Narrowing Chevron's Domain*, 70 Duke L.J. 931 (2020)

This article is aimed at pinpointing the proper scope of Chevron deference, in light of Supreme Court precedent. The authors recall that in *Mead*, the Court specified this scope, by limiting it to agency decision-making with the force and effect of law [See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)]. In the other cases, agency interpretations are subject to "the lesser *Skidmore* deference" (956) [*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), especially at 140]. As far as adjudication proceedings are concerned, even though the authors consider the exclusion of any deference to agencies as the best solution, they argue that courts may be deferential towards agency interpretation in formal adjudications but not also in informal ones (964). In this sense, since it has become rather common for courts to read statutes as granting agencies wide discretion to decide whether to conduct or not formal proceedings in adjudication, the application of Chevron deference depends on that agencies' choice (970-971). However, the scope of Chevron deference may become narrower: the authors also exclude from this scope formal adjudication proceedings, whenever the agency lacks a rulemaking power. In

those cases, indeed, "the argument that Congress has nonetheless implicitly authorized that agency to make policy, with deference, via adjudication is hard to see" (981). Supreme Court case law demonstrates that the Chevron doctrine has mainly been applied to proceedings concerning just notice-and-comment rulemaking (984-989).

D.D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 *Stan. L. Rev.* 175 (2021)

According to the unitary executive theory, Article II of the Constitution assigs the U.S. President the power to control and remove all executive branch officials. Such a power would be implicit in the concept of executive power, as observed by Chief Justice Taft in *Myers* on the basis of 17th and 18th century-Britain experience [*Myers v. United States*, 272 U.S. 52, 117-118 (1926)]. However, this article argues that, at the time, the British Crown did not enjoy such a wide prerogative. Many executive officers had tenured positions, and – above all – their appointment and removal were regulated by Parliament or however not entirely left to the King's will. Indeed, the legislative body "could, and did, grant tenure protections to executive officers without it being seen as an interference with the King's executive power" (228), except for some sectors, namely the military and foreign affairs (232). Therefore, the author relies on past British history of the executive branch to oppose the unitary executive theory, and thus to recognize Congress the power to "shield administrators, regulators, and law enforcement officials from removal without cause and other forms of presidential interference" (236).

R.E. Levy, R.L. Glicksman, *Restoring ALJ Independence*, 105 *Minn. L. Rev.* 39 (2020)

Administrative law judges (ALJs) are the agency officials charged with conducting formal adjudication proceedings, and this function requires them to be insulated from political pressures. The article intends to draw attention on the need for legislative intervention to ensure ALJs' independence. After illustrating the existing threats to this independence (53-68), the Authors analyze some recent Supreme Court decisions, which are concerned with the guarantee of good cause for removal of executive branch officials. Those decisions are deemed to "cast

doubt on the validity of good-cause requirements for ALJs and their superiors" (69). Pursuant to 5 U.S.C. § 7521(a), any action the agency decides to take against an ALJ requires the existence of good cause, determined by the Merit Systems Protection Board (MSPB) "on the record after opportunity for hearing before the Board".

The authors argue that it is important to establish whether the principal officer to the ALJ is the agency employing her or the MSPB. If the relevant principal is the former, then the double-level protection problem arises only if the agency head is also subject to good cause removal, like the SEC [(Securities and Exchange Commission)] or the SSA [(Social Security Administration)]. If, on the other hand, the relevant principal is the MSPB, whose members are removable only for good cause, then all ALJs are subject to dual good-cause removal provisions" (73). If a two-layer protection of ALJs from removal is considered an excessive restriction of the President's removal power, thus unconstitutional – the authors continue – "a court would have to determine whether to invalidate the good-cause removal provision for ALJs, or to sever good-cause removal requirements for the agency head" (74). In general, independence and good-cause removal provisions are both aimed at ensuring impartiality in ALJs' administrative action (84). The authors do not consider the creation of an administrative court to judge ALJs' removal a viable solution, as it raises a lot of problems (96-100). Another option would be to establish a central panel model, wherein the chief ALJ plays a pivotal role (100-102). In the authors' view, such a panel "could protect ALJ independence in a manner that is consistent with the constitutional requirements for appointment and removal of ALJs, while preserving agency expertise and policy authority and clarifying the appropriate scope and means of agency policy control over ALJ decisions" (103).

J.M. Cross, A.R. Gluck, *The Congressional Bureaucracy*, 168 *U. Pa. L. Rev.* 1541 (2020)

This article puts stress on a much-overlooked aspect of the legislative branch – its robust administrative apparatus. This internal bureaucracy is composed of thousands of nonpartisan highly qualified and usually tenured officials, who conduct most

of research and analyses in the drafting of statutes, thereby providing fundamental assistance to members of Congress. The authors underline that even though this bureaucracy, unlike the more traditional executive branch one, works not only for the majority but for the whole Congress, it is not required to be necessarily "position-neutral" (1621). In particular, the Joint Committee on Taxation, the Government Accountability Office, the Congressional Budget Office, and the Congressional Research Service usually draw their own conclusions from the analyses they have to conduct. In doing do, they follow a method, capable of safeguarding their objectivity. This "Weberian focus on rationalization" allows them to express views "that some members [of Congress] might not wish to receive" (1623).

Even though most of the congressional bureaucracy's work does not have direct legal effect, its intervention in the legislative process may be either mandatory or not mandatory, depending on the relevant office. For instance, the role of the Congressional Research Service and that of the Offices of the Legislative Counsel fall within the latter category. A Congressional Budget Office estimate is instead requisite for any bill or resolution approved by congressional committees, and similarly the Joint Committee on Taxation has to step in when legislative previsions on revenues are under discussion (1628-1629). Once a statute is passed by Congress and thus enacted, it has to be inserted into the U.S. Code, whose "custodian" (1567) is a component of congressional bureaucracy – the Office of the Law Revision Counsel. Its role is not just a formal but rather a substantial one. In order to identify the most suited title of the U.S. Code for a new statute, this office is permitted to modify statutory language. It also adds cross references, subtitle divisions, and headings, or even "new textual provisions, like definitions(!)" (1664). Each codified statute is subsequently approved of by Congress, which thus "blesses these edits and changes" (1665). In light of such a reconstruction of the drafting, enactment, and codification of statutes, the article concludes with a discussion about canons of statutory interpretation (1674-1682).

K. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 *Duke L.J. 1695* (2020)

This article addresses the issue of at-will removal of adjudicators by agency heads as a possible threat to impartiality in adjudication proceedings. In general terms, decisions made by the competent officials in those proceedings may be reversed by agency heads, who in turn may be removed by the President at will. Therefore, except for independent administrative agencies, the principle of impartiality of adjudication should not be applied too rigorously (1705). However, it has long been acknowledged that the ability of at-will removal, along with the practice of financial incentives, is capable of affecting compliance with due process in decision-making adjudication. In such a sense, Congress seems to be allowed to regulate the removal power (1706-1707), thereby curbing the President's authority. At the same time, the removal power is coherent with the Take Care Clause of Article II of the Constitution, which implies the President's control over the executive branch for the faithful execution of laws (1707).

By referring to two quite recent Supreme Court decisions, namely *Free Enterprise Fund* [*Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010)] and *Lucia* [*Lucia v. SEC*, 138 S. Ct. 2044 (2018)], the author underlines that all ALJs hold continuous positions established by law and exercise trial-judge-like powers. Many non-ALJ adjudicators, too, have such powers, but it is not clear whether they enjoy a continuous office (1712-1713). Similarly, not only ALJs but also many non-ALJ adjudicators are assigned the power to issue final orders (1716). The issue of impartial adjudication and insulation from removal may be tackled within the executive branch, especially by establishing an internal separation of powers (or functions), in order to provide agency adjudicators sufficient protection from political pressures (1721-1728). On the basis of this argument, the author proposes leaving to individual agencies the adoption of impartiality regulations (1728-1733). He argues that such regulations may solve the issue just mentioned by « duplicat[ing] ALJs' current statutory protection from at-will adverse action for all agency adjudicators» (1733-1734). He specifies that the regulations also produce the beneficial effect of preventing a presidential administration from hindering the MSPB's functioning (1736). Furthermore, they may

establish merit-based rules and criteria for the hiring of ALJs and, more broadly, all agency adjudicators (1738-1739).

Other recent law review articles of significant interest to administrative law scholars are the following:

- D. A. Candeub, *Preference and Administrative Law*, 72 *Admin. L. Rev.* 607 (2020)

The article intends to offer a new perspective to a traditional issue – the nondelegation doctrine. In the author's opinion, the fact that Congress delegates lawmaking power to federal agencies, thus to the executive branch, may be analyzed as a matter of degrees, not by applying rigid categories. In this sense, the biggest decisions, those with a broad range, should be made by Congress, while more specific ones, thus decisions that clearly appear as implementing measures, may be delegated to agencies. A criterion the author suggests to identify to what category a given decision belongs is to verify its economic impact.

- P. Conti-Brown, David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 *Yale L.J.* 636 (2021)

This article is aimed at analyzing how the Federal Reserve has been facing new challenges that fall within its statutory mandates. From the authors' perspective, the Federal Reserve is able to perform such tasks by employing its technocratic pragmatism. In particular, three challenges are considered. The first is the appearance of cyber risk, which led the Fed to develop specific expertise. The second is the phenomenon called emergency lending, which occurred before and during the 2008 economic and financial crisis, and presented itself once again recently, after the beginning of the COVID-19 pandemic. The third is the role the Fed may play with respect to the broad issue of global climate change.

- K. Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 *Stan. L. Rev.* 237 (2021)

This article deals with the good cause exception to public participation in agency rulemaking, provided for in the Administrative Procedure Act (APA). In particular, 5 U.S.C. § 553(b)(3)(B) allows an agency to avoid carrying out ordinary notice-and-comment procedures when it "for good cause finds" that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest". While this exception was originally meant to apply rarely, it is invoked in a high percentage of cases nowadays. The author argues that the best way to face this issue is not to amend the statutory provisions but rather to allow courts to conduct de novo review of agency determinations on usage of the exception. Therefore, the key to solve the issue is identified in the standard of judicial review.

- Note, *Beyond "No Law to Apply": Uniting the Current Court in the Context of APA Reviewability*, 134 *Harv. L. Rev.* 1206 (2021)

This note is concerned with limits to agency reviewability before courts. Under the APA, 5 U.S.C. § 702 recognizes the right to turn to courts to those "adversely affected or aggrieved by agency action". However, § 701 exempts agency action from judicial review if the latter is precluded by statutes ((a)(1)) or if it is statutorily established that the former be "committed to agency discretion" ((a)(2)), and this second exception is the one on which the note focuses. Relying mainly on Justice Scalia's opinion, it argues that "APA reviewability bears directly on the law/policy distinction because 'hard look' review thrusts the courts into policy questions" (1217). Accordingly, the note opposes the "presumption of reviewability" the Supreme Court has followed for a long time (1218-1221) and cast doubt on the usage of the so-called "no law to apply" test (1222-1223). Finally, the note agrees with most of the reasoning of Justice Alito in the recent *Commerce* decision [*Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)]. This partly-concurring and partly-dissenting opinion is seen a possible model to solve the issue under discussion: "Its rejection of a universal presumption of reviewability, implicit

attention to the public/private rights distinction, and downplaying of the "no law to apply" test in favor of assessing specific traditions of review track both the original meaning of § 701(a)(2) and the law/policy distinction" (1224).

Law Reviews' Abbreviations
Cornell L. Rev.: Cornell Law Review
Duke L.J.: Duke Law Journal
Stan. L. Rev.: Stanford Law Review
Minn. L. Rev.: Minnesota Law Review
U. Pa. L. Rev.: University of Pennsylvania Law Review
Admin. L. Rev.: Administrative Law Review
Yale L.J.: Yale Law Journal
Harv. L. Rev.: Harvard Law Review