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## RETAINING THE RULE OF LAW IN A *CHEVRON* WORLD

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Few topics have engendered as much scholarly output and debate over the last few years as statutory construction. In the course of exploring the special problems of interpretation in the administrative law content, Professor Strauss's article offers a quite original perspective on many of these issues. As the breadth of Strauss's discussion reveals, the traditional court/Congress interpretative paradigm needs to be broadened in this context to account for the wide variety of institutions directly involved in the post-enactment interpretative process, including administrative agencies, Congressional staffs, oversight committees, and Presidential staff. In particular, this environment raises two special types of issues for the interpretative enterprise.

First, institutional choice must be made not only between a large number of different institutional entities, but also in the shadow of complicated informal interactions between all of these institutions, which can undo, or at least modify, any formal investment of authority. Although these informal processes are increasingly the subject of administrative law scholarship, in part based on public choice political science, only recently have we considered how this affects the process of statutory construction.

Directly related to this institutional choice debate is the traditional concern in administrative law over vesting authority in officials who may be viewed as lacking democratic legitimacy—that is, in the proverbial headless fourth branch of government. Scholars of literary theory have, by illuminating the discretion inherent in the interpretative process, underscored the problem of legitimacy in *judicial* construction. As Professors Rubin and Strauss have discussed, delegations to administrative agencies also occur through explicit as well as implicit processes—vesting in unelected bureaucrats a power to interpret necessarily vague language that might be viewed as equally, if not more, problematic than judicial construction.<sup>1</sup>

Strauss's quite thoughtful piece should be viewed, I think, as an at-

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1. See Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

tempt to confront these and other problems of interpretation in the administrative content. Whatever the value of legislative history elsewhere, Strauss believes its use is necessary here to deal with the special concerns raised by administrative interpretation—retaining a rule of law culture in a politicized post New Deal state. Although I am more sympathetic to “politics” and “political solutions” than Strauss’s “rule of law” approach appears to be, I ultimately agree with most of his analysis. It is important, though, to elucidate what I take to be his underlying objectives and how they fit within administrative law debate—a point that is sometimes implicit but not explicit in his article. For this reason, my discussion will focus less on the pure interpretive questions that fill up much of this symposium, and more on administrative law questions. That is the special insight in Strauss’ piece and also, I shall argue, the best way to appreciate the strengths of his arguments as well as their underlying assumptions.

### I. ADMINISTRATIVE DISCRETION

For administrative law scholars, *the* fundamental debate has historically been over the inherent discretion of Executive branch officials. As Strauss observes, this power is a result of explicit delegations to administrative agencies, as well as the adoption of necessarily vague statutes that must be given operative meaning by administrative officials in a post new deal world. Over the years, a variety of theories have been put forward to rationalize the exercise of administrative discretion—hard look judicial review, public participation through expanded procedures and rights of intervention, and bureaucratic instrumental expertise, to mention only a few.<sup>2</sup>

Without attempting to reach any conclusion on the relative support for these perspectives, two new approaches, borrowing from modern political science, seem to have recently gained some note. In effect, each suggests that a different democratically elected institution can and/or does remain informally responsible for Executive agencies.

The first points to Presidential oversight, via expansion of the Executive Office of the President and Executive order review, as a potential source for bureaucratic legitimacy.<sup>3</sup> The President, after all, is, like members of Congress, democratically elected. Indeed, given that office’s

2. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

3. See Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

higher level of visibility and national focus, some have viewed the Presidency as *more* democratic.<sup>4</sup> Greater Presidential authority over the bureaucracy, including exercise of its interpretative authority under *Chevron*,<sup>5</sup> could make the bureaucracy popularly accountable through the President. Under this analysis, a series of recent legal changes increasing Presidential oversight, as well as political changes possibly enhancing the power of the office, could be viewed as helping to alleviate problems of administrative legitimacy.

Aside from the President, Congressional oversight has also been advanced as a limit on the fourth branch. An evolving political science literature has begun to illuminate the numerous informal ways Congress, especially through committee oversight, is able to exercise significant control over agency actions. Based on principal/agency theory, which outlines the informal ways principals may limit their agents, this so-called Congressional dominance literature has suggested Congress may well exercise extensive control over administrative officials, through FOIA, GSA, public hearings, and appropriation riders.<sup>6</sup> At its strongest, some have even suggested administrative actions are explainable largely in terms of changing personnel and preferences of Congressional committees.<sup>7</sup> To the extent this phenomenon occurs, we may not have a serious delegation problem, at least in the way usually claimed. The fourth branch is under the informal control of either a democratically elected Congress or President.

Nevertheless, there are problems with these "solutions" (if you can call them that) to the delegation problem. The first is the potential decline of the "rule of law" when decisionmaking in a bureaucracy is subject only to *informal* controls. Among other things, rule of law has traditionally meant decisionmaking subject to precedent or norms of consistency. In the administrative context, this has led to public decisionmaking through formulation of general laws or rules, and later their substantive application by different officials through a separate process, usually administrative adjudication or rulemaking. The normative attraction of this two step process is somewhat reminiscent of Rawl's veil of ignorance—serving to excise some knowledge of the substantive mean-

4. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985).

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

6. See, e.g., McCubbins, Noll, & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33 (1986).

7. See, e.g., Weingast & Moran, *The Myth of the Runaway Bureaucracy*, REGULATION, May-June 1982, at 33, 37-38.

ing and application of general rules or decisions when they are first promulgated. Decisionmaking in administrative agencies through rulemaking followed by adjudication serves some of this need, but the informal processes discussed above (such as Presidential, legislative, and public oversight) tend not to. Indeed, these influences can exacerbate the problem, as political actors attempt to resolve problems at a high level of specificity during the implementation stage, subject to no prior standards.<sup>8</sup>

A second problem with modern delegation is the increasing and sustained political divergence in party control of the Executive and legislative branches over the last thirty years. Obviously, we have long recognized that administrative personnel, formally the instrumental agents of Congress, pursue independent goals; this was the standard critique of the new deal agency captured by regulated interest groups.<sup>9</sup> Today, however, the Executive branch, if under the control of a President consistently from a different party than Congress, may be politically *opposed* to the substantive programs and policies it is legally charged with enforcing.<sup>10</sup> While this divergence is perhaps less likely in an era of strong political parties, where one party is likely to capture both branches, today we seem to have institutionalized an adversarial relationship between the lawmaking and law applying branches.

To the extent this is true, Presidential control may *undermine* the exercise of delegated authority, not only in the case of specific delegations, but interpretative discretion as well. Executive agencies, exercising their *Chevron* discretion, will be less likely to reflect the political goals and tradeoffs of the Congress that originally adopted the legislation in the narrowly instrumental fashion that is sometimes assumed in academic debate on administrative delegation. Moreover, any ongoing "interpretative dialogue" between the branches on these issues may be less likely to bear fruit, let alone converge on a rough consensus. We are, after all, dealing with two quite distinct political parties (or to use the current vernacular, "interpretative communities") with potentially quite different perspectives on various statutory mandates. Thus, despite the fact that the President and Congress have many informal controls over the Executive branch, the concerns of delegation may not only remain; they may be even greater.

8. See Fitts, *Can Ignorance Be Bliss?: Imperfect Information as a Positive Influence on Political Institutions*, 88 MICH. L. REV. 917, 979 (1990).

9. See, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955).

10. See B. GINSBERG & M. SHEFTER, *POLITICS BY OTHER MEANS* (1990).

## II. LEGISLATIVE HISTORY AS A SOLUTION TO THE DELEGATION PROBLEM

When all is said and done, Strauss' greatest contribution, I think, is in confronting and offering a potential solution responding to these two problems. With respect to the divided control of the Executive and legislative branches, Strauss argues that legislative history will serve to shape and limit the discretion of the Executive branch, usually making it more faithful to the original enacting body. Although legislative history can expand the discretion of the interpreting institution, as decisionmakers pick and choose from the relevant history, Strauss argues, probably correctly, that it often limits discretion and ensures greater faith to the original Congressional action. Reliance on history can be abused, but so too can language, which surely cannot be understood absent an understanding of social context, including legislative history.

Strauss also suggests that resort to legislative history will help reintroduce a modified rule of law into bureaucratic decisionmaking in the *Chevron* era. While the somewhat artificial distinction between legislative lawmaking and administrative application is enormously complicated in our post new deal world, legislative history may serve a modest rule of law constraint—in effect, helping to give effect to the bureaucratic and professional norms that were embodied in the professional goals of those drafting the statute. Agencies which are required to interpret statutes in light of these *preexisting* views may reflect a *quasi* rule of law. Although Strauss does not develop in detail what values the rule of law furthers in this context, presumably it is not simply giving effect to bureaucratic expertise or increasing the power of the legislative branch *per se*. Rather, it appears to be based on the value of decisionmaking made through previously adopted general rules or decisions. In this sense, the use of legislative history may not be the stuff of Hart and Sachs, but perhaps it is the best we can do today, where Congress must act through intransitive legislation.

Of course, this conclusion may seem counterintuitive. To some, reliance on legislative history should *undermine* the rule of law, that is, the need for “law” to be in the text of the statute, which is subject to a type of “legislative due process,” rather than in the legislative history alone. Judge Easterbrook, for example, has suggested that reliance on legislative history may contravene constitutional requirements of bicameralism and presentment, since the documents that make up that history do not for-

mally satisfy these hurdles.<sup>11</sup> Strauss's claim, however, is that textual interpretation can create *greater* rule of law concerns in a *Chevron* world, since Presidents and bureaucrats will be *otherwise* free to construe legislation absent *any* preexisting historical constraints. In the informal world of bureaucratic politics, legislative history may be the best legislative due process we can have.

This point, which is quite insightful, is critical to Strauss's contracts analogy, which is more complicated, I think, than it might first seem. Strauss argues that legislative history should also be relied upon in the administrative context, where agencies and Congress have repeated interactions, for somewhat the same reasons that courts "liberally" construe contracts where parties have a continuing course of dealings. In contracts law the existence of extensive dealings supposedly offers a source for better understanding of the parties "agreement" and how it should be applied and updated. Likewise, in the administrative context, it might be suggested, we should look beyond the formal agreement—the language of the legislation—to include an analysis of the outside interactions, as captured at least partly in the legislative history.

There is something to this analogy, but it is ultimately persuasive only if understood in the context of the two delegative concerns outlined above, as Strauss, I think, recognizes. If we were to apply rigidly the rationale of the contracts literature alone, the agencies and courts would look not only at the legislative history (that is, relax the parole evidence rule), but also subsequent interactions and interpretations of the branches as well. By analogy to the contracts theory, the *full* relationship between the parties, including their *evolving* interactions, should be understood in interpreting the "meaning" of their agreement. After all, it is this evolving relationship which justifies resort to sources outside the agreement. But the argument for legislative history generally seeks to limit updating of the agreement in light of the changing relations. Strauss does not want administrative officials interpreting statutes in light of the *current* relationship with the President or Congress; to the contrary, he wishes them to be bound to the full *original* agreements and understandings by expanding those "agreements" to include legislative history. Administrative officials are supposed to rely on legislative history in the process of *resisting* current pressures from the President or oversight committees. In this sense, the contracts literature would seem

11. See, e.g., Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533, 547 (1983). See also Easterbrook, *What Does Legislative History Tell Us?* 66 CHI.-KENT L. REV. 441 (1990).

to count *against* the thesis.<sup>12</sup>

This explains why the other two factors discussed above are critical to the argument. The desire not to update the statute is ultimately based on these two additional concerns—the desire to further the rule of law and limit the consequences of the change in “parties” (*i.e.*, administrations). Strauss’s claim, I think, is that this need is especially important in the informal repeat player context of administrative construction because of the inordinate pressure to overlook the rule of law. In this network of informal relations, we are especially unlikely to protect such values. In addition, there also may be more that is valuable in that history because we are dealing with repeat players, engaging in communication and dialogue within their own community off the formal record.<sup>13</sup> Taking all of these arguments *together*, therefore, offers a quite textured argument for reliance on legislative history.

### III. IMPLICATIONS OF THE ARGUMENT

The thesis, however, does raise important policy questions. Most importantly, as noted above, this approach could be viewed, from another perspective, as *undermining* its primary objective—furthering the rule of law. Lawyers are often unclear about exactly what ends are being served by the “rule of law”. As a general matter, it requires acting subject to or consistent with previously agreed on rules or decisions, or subject to some form of due process. As a practical matter, it is sometimes taken simply to mean giving effect to the expertise of bureaucrats, the prior judgments of legislative actors, or dividing interpretative power.

In many cases, however, the line between law and politics can be quite thin, with vague rule of law protections having serious political implications. Legislative history, for example, can be very general, easily

12. I don’t believe Strauss would disagree with this analysis, which purports to be merely a restatement of his argument. At some points, however, he might be viewed as suggesting the contracts literature independently justifies resort to legislative history. For example, he says:

Context—both at the time of drafting and as revealed in subsequent life under the contract—are essential both to accommodate the legal order to the realities of the setting in which contracting is going on, and to understand how the parties reasonably viewed the parameters of the relationship. The analogy to the problem of legislative history in the agency context ought to be obvious . . . . Denying force to the political history of intransigent legislation is inconsistent with the reality of the setting within which legislation occurs and with the way in which agency and the legislature reasonably view the parameters of their relationship.

Strauss, *supra* note 1, at 49-50. Taken alone, this appears to justify looking not only at legislative history, but also at the “subsequent life under the contract.” Strauss, however, wishes to place a *limit* on such “updating,” by making legislative history and text more binding.

13. Though one could argue the opposite, namely, that expert drafters should be better able to include the relevant information in the statute. From this perspective, we should be more suspicious about their failure to do so. *See infra*.



manipulated later by executive branch officials with special career or institutional objectives. Bureaucrats may merely be furthering their personal policy by saying "We've built up a set of expectations that will unravel if we go that way".<sup>14</sup> To the extent history is buried in ambiguous committee reports or internal bureaucratic memos, it can often become the *rationalization* for a subsequent position, the method by which committee or bureaucratic interests are resurrected, rather than any rule of law *limitation*.<sup>15</sup> Because we are dealing with sophisticated repeat players, there may be more in those files which is relevant, but also there may be more potential for abuse, especially as against less sophisticated Presidential appointees or non-oversight committee members of Congress.<sup>16</sup> This would be especially true if the same persons who drafted the legislative history are the ones interpreting it. The ability to both set and interpret precedent may reduce any rule of law constraint.<sup>17</sup>

Beyond the generality and malleability of some legislative history, there remains a question about its procedural pedigree—a traditional rule of law concern. In the eyes of some bureaucrats, legislative history includes informal "understandings" and "exchanges." Unfortunately, these internal memos, subcommittee testimony, and the like may be less subject to legislative due process—that is, public congressional scrutiny—than committee reports on legislation, or legislation itself. Legislation is a social, not a two person contract.

For similar reasons, resort to legislative history may further a certain type of democratic accountability, but occasionally undermine another. While legislative history may make the Executive branch more accountable to *past* legislative enactments, it may *also* increase the influence of the legislative committees within that branch as well as empower the bureaucracy vis-à-vis a recently elected President. To be sure, most of these legislative documents are generally available to the rest of Congress and the President, who retain formal control.<sup>18</sup> The informal understandings, however, are less likely to be scrutinized. Many scholars still express concern over the informal influence of the "iron-triangles",

14. See Strauss, *supra* note 1.

15. Many who have served in the Executive branch (including myself) have frequently observed agency officials presenting a one-sided review of the history of a program, or creating a one-sided history in the agency's or committee's files in the first place.

16. To this extent, rule of law might mean requiring legislative drafters to place that information in the statute itself, not simply in the legislative history, which can be more easily manipulated.

17. In this sense, reliance on legislative history by agencies may be different than by courts, which are not involved in the initial drafting, as Strauss argues, but for reasons sometimes *undermining* the rule of law analogy.

18. See G. COX & M. MCCUBBINS, PARTIES AND COMMITTEES IN THE U.S. HOUSE OF REPRESENTATIVES (1989 Draft).

which represent the classic principal agency problem. If significant, these forces may gain influence by any blanket resort to legislative history or increased bureaucratic hegemony—influence against a popular elected President.

This brings into focus the institutional choices implicit in this type of debate. Which institutions should be given greater interpretative (and therefore substantive) power in these various contexts: enacting Congresses or committees; current Congresses or committees; current or past bureaucrats; current Presidents? In the aftermath of *Chevron* Strauss fears that we lean too far in favor of current Presidents, and wishes to invigorate past Congresses.

If the issue is framed in such bald institutional terms, I have to confess that I worry, for the reasons stated above, about the impact of any blanket embrace of legislative history on agency, committee and Presidential influence. At least in the abstract, I am probably more sanguine than some others about the value of Presidential powers *over the long run* and the benefits of updating statutes in our post new deal world.<sup>19</sup> Liberal interpretation of statutes by Presidents and their administrations can undermine the rule of law, as did the demise of the non-delegation doctrine, but also can further public and political accountability. Over the years, Presidents and their administrations may be more visible and accountable than administrative officials who are merely giving effect to professional norms and understandings.

In this regard, I also am concerned with the problems created by divided branches, which can be exacerbated by increased bureaucratic hegemony. Strauss implicitly argues in favor of strengthening the reach of past Congresses and the permanent bureaucracy. While divisions in responsibility further traditional checks and balances they can also muddle political and bureaucratic responsibility. Good law may be in tension with good politics at some point. Although present day liberals may be less disturbed by this prospect, we should remember that a modern Roosevelt or Kennedy would be subject to the same impediments.

In light of the political implications of these issues, it might be helpful if we could resolve these choices subject to some constraint like a veil of ignorance, not knowing who or which ideology would be empowered by a particular allocation.<sup>20</sup> Indeed, over the long run, the ideological

19. Inman & Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J.L. ECON. & ORG. 79, Special Issue (1990); Fitts & Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, — GEO. L.J. — (forthcoming).

20. See Fitts, *supra* note 8. Put another way, any rule of decision would need to be subject to a long time horizon.

implications should balance out. Perhaps academics would be able to reach a greater level of agreement; at a minimum, practitioners of politics might be more concerned with institution building, since groups would be less likely to view institutions in narrowly ideological terms. Unfortunately, institutions have become increasingly identified with particular ideologies, complicating this and other separation of powers debates. It is to Strauss's credit that he notes the political implications of these choices, but ultimately seeks to resolve his institutional recommendations, as I try to do, in broader social principles.

In the end, though, all of these concerns are grounds only for reading legislative history with greater care, not for ignoring it altogether. Remaining sensitive to the processes by which legislative history is generated can minimize abuse, without throwing the baby out with the bathwater. There are iron triangles and strategic players operating in Washington, but there are also hardworking bureaucrats attempting to confront difficult problems in a state, as they say, of "imperfect information".

When all is said and done, much of our skepticism of legislative history is predicated on a strategic model of self-interested actors slipping material into law without popular review or acceptance. If one adopts the popular zero transaction cost, self-interest paradigm, this analysis has some appeal. Indeed, it is almost tautological: Why would anything remain in the legislative history *unless* its proponents feared their inability to gain its acceptance from the rest of Congress and the President?

In most cases, however, the ambiguities in statutes are not strategic; the failure to elucidate an objective is usually a mistake in foresight or a reflection of informal bureaucratic norms, not of political manipulation. With regard to many matters of interpretation, the bureaucracy and relevant committees of Congress are part of a relatively consensual community. In these cases, resort to legislative history is more likely to further the rule of law, in the sense described above, than the rule of bureaucratic politics. Even though I might rate the risk, and the need for vigilance in reading that history, higher than some others,<sup>21</sup> in the end I agree with Professor Strauss that it would be folly to deprive interpreters of its insights.

21. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1601 (1988).